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An analysis of pre-trial publicity and the accused's right to a fair trial: A deconstruction of the *Krion* case

by

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TABLE OF CONTENTS

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CHAPTER 5

THE PRESUMPTION OF INNOCENCE

In our country and throughout the British world, as far as I know, and in the jurisprudence of many civilised countries, a person is regarded as innocent until he is convicted.[1]

Good men everywhere praise the presumption of innocence.[2]

While we want the guilty to be convicted, it pains us more to convict an innocent person. Hence, we presume the accused innocent, and deliver an acquittal so long as guilt is not established beyond reasonable doubt.[3]

5.1 Introduction

This chapter explores a further fundamental feature of the South African accusatory trial, namely the presumption of innocence. It should be pointed out at the outset that the meaning, scope and application of the presumption of innocence have been the subject of exhaustive academic analysis worldwide.[4] For present purposes, therefore, only an outline is given of the meaning, scope and function of the presumption and its construal in terms of South Africa's common-law tradition and the place of the presumption in the South African Constitution. Within this context, the pertinent question of whether negative or virulent pre-trial publicity can have any impact on the presumption of innocence is also sought to be answered.

An essential purpose of a criminal trial is to ensure that the process whereby the prosecutor, as it were, accuses and the accused defends, with the judge holding the balance, is governed by constitutional, evidential and procedural rules in order that the accused receives a fair trial. A 'central feature' of this underlying function of a criminal trial is the presumption of innocence.[5] It is said that the presumption of

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[1] J Crwys-Williams *In the Words of Nelson Mandela* (2013 – Reprinted Edition) 67-68.
[2] GP Fletcher 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 *The Yale Law Journal* 880 880.
[3] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 279-280.
[4] In a South African context, PJ Schwikkard *Presumption of Innocence* (1999), is a definitive work on the subject.
[5] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 271.

innocence 'is among the small handful of doctrines in criminal law that are ubiquitous across a very broad spectrum of legal systems', no less than in common-law jurisdictions.[6] Vivian Deborah Wilson[7] points out that '[i]t is a mark of the adversary system that the accused, entering the courtroom to undergo ordeal by trial, is perceived as cloaked in the presumption of innocence for "all persons shall be assumed, in the absence of evidence, to be freed from blame."'[8] Sarah Summers[9] notes that one doctrine 'which embodies the popular notion of the fairness of the British criminal law, is the presumption of innocence.'[10] Across the Atlantic, the United States Supreme Court has described the presumption of innocence as a 'wellspring of American criminal procedure.'[11] In *Kentucky v Whorton*, Justices Stewart, Brennan and Marshall observed that:[12]

> No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial.

In South Africa the presumption of innocence is firmly entrenched in the common law and section 35(3)(*h*) of the Constitution, which provides that: 'Every accused person has a right to a fair trial, which includes the right… to be presumed innocent, to remain silent, and not to testify during the proceedings'. Thus, the presumption of innocence, as in other common-law jurisdictions such as the United States of America[13] and Canada,[14] is a basic or fundamental component or element of the

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[6] L Laudan 'The Presumption of Innocence: Material or Probatory?' (2005) 11 *Legal Theory* 333 333. See also Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 25; A Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010) xxxvii, noting that the presumption 'is universally recognised as a core principle in the administration of criminal justice.'

[7] At the time of writing, Wilson was Associate Professor of Law, Hastings College of the Law, University of California.

[8] VD Wilson 'Shifting Burdens in Criminal Law: A Burden on Due Process' (1981) 8 *Hastings Constitutional Law Quarterly* 731 731.

[9] At the time of writing, Summers was an Independent Legal Researcher.

[10] Summers (2001) *The Juridical Review* 38.

[11] Laudan (2005) *Legal Theory* 333.

[12] 441 US 786 790 (1979), cited in Laudan (2005) *Legal Theory* 333-334. The Justices added in *Whorton* supra 790, that the Due Process Clause contained in the Fourteenth Amendment to the Constitution of the United States of America, which 'above all else' guarantees a fair trial, not only 'requires proof beyond a reasonable doubt of a defendant's guilt', but 'equally [also] requires the presumption that a defendant is innocent until he has been proved guilty.' It was reaffirmed that the presumption of innocence is thus a '"basic component"' of a fair trial. (*Ibid* 790).

[13] See, for example, *Estelle v Williams* 425 US 501 503 (1976), where the United States Supreme Court held: 'The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.'

[14] Compare, for instance, *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 38*b*-*c*, where it was affirmed that *inter alia* section 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which guarantees the accused's right to be presumed innocent, is a 'specific instance' of the 'basic tenets of fairness upon which [Canada's] legal system is based', and is 'now entrenched as a constitutional minimum standard by s. 7' of the *Charter*, which provides that: 'Everyone has the right to life, liberty and

accused's right to a fair trial.[15] In *S v Manamela and Another (Director-General of Justice intervening)*, the majority of the Constitutional Court affirmed that the accused's right to silence and to be presumed innocent are both 'procedural rights which are central to the adversarial criminal process which was developed under the common law and subsumed into the Bill of Rights.'[16] Similarly, in the Constitutional Court decision of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, Sachs J pointed out that *inter alia* the right to be presumed innocent until proven guilty is part of the adversarial system of criminal justice 'that is deeply implanted in our country and resolutely affirmed by the Constitution.'[17]

What is more, B Beinart, in attempting to distil the precise meaning of the concept '*The Rule of Law*'[18] and under the rubric: 'Minimum Standards of Justice', observes that '[c]losely associated with the fairness and impartiality of the courts are certain rules, techniques and procedures which the law courts have developed for the better administration of justice and for the more effective protection of rights.'[19] Beinart states that '[t]he more fundamental of these constitute part of the authoritative technique inherent in justice according to law and therefore also form part and parcel of the Rule of Law'; '[t]hey do not include all the procedural rules of the courts but only those which can be described as providing the basic requirements for a fair trial, commonly referred to as the minimum standards of justice.'[20] The writer proceeds to enumerate several of such procedural rules that that are integral to the rule of law principle.[21] These include 'that every person is presumed innocent and that the onus is on those who make accusations or allege facts to prove them - *qui allegat probat*.'[22] Beinart adds that '[w]ith this may be taken

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security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[15] *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 9, where Ackermann J, for the Constitutional Court, found that elements of the right to a fair trial are specified in paragraphs (*a*) to (*o*) of section 35(3) of the Constitution, and as such constitute discrete sub-rights of the right to a fair trial.

[16] 2000 1 SACR 414 (CC) para 23.

[17] 1996 1 SA 984 (CC) para 246 (footnote omitted). In A Paizes 'A closer look at the presumption of innocence in our Constitution: what is an accused presumed to be innocent *of*?' (1998) 11 *South African Journal of Criminal Justice* 409 413, it is also observed that the presumption of innocence has grown out of the common law and been elevated to a constitutional right. See too *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) paras 9-10; Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-26; Schwikkard *Presumption of Innocence* 7.

[18] Beinart (1962) *Acta Juridica* 100 (author's italics).

[19] *Ibid* 118-119.

[20] *Ibid* 119 (footnote omitted).

[21] *Ibid* 119-121.

[22] *Ibid* 119 (footnote omitted). See also J van der Berg *Bail: A Practitioner's Guide* 3 ed (2014) 19.

the essential substance of the procedural pattern which courts have designed for testing the truth of allegations and of the evidence produced in support; this includes the right of questioning and cross-examining witnesses.'[23]

The Constitutional Court has also described the right to be presumed innocent as 'a pillar' of the country's system of criminal justice.[24] With regard to South Africa's interim Constitution, commentators noted that '[t]he presumption of innocence is certainly one of the most widely known and adhered to safety mechanisms in the criminal process. Its constitutionalization as a right in s 25(3)(*c*), however, makes it a normative principle in determining the rules of "fair play" in criminal trials.'[25]

The presumption of innocence is a fundamental part of due process and is instrumental thereby in upholding the rule of law; the presumption emerges from an umbrella of evidential and procedural rules that are recognised as essential components of a democratic society and designed to restrain the power of the State to interfere in the lives of individuals while continuing to facilitate the punishment of crime.[26]

Notwithstanding such rhetoric, there is much ambiguity or little agreement over what the concept of the presumption of innocence actually represents and what its ambit and scope are.[27] Larry Laudan[28] argues that with such judicial declarations which affirm that the principle that there is a presumption of innocence in favour of the accused '"is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of [the] criminal law"',[29] 'one would expect it to be reasonably clear what the presumption of innocence is, when and where it applies in criminal proceedings, who is bound by it, and what relations it has to other key doctrines and precepts of the law such as reasonable doubt, the burden of proof, the benefit of the doubt, and due process generally.'[30] Laudan indicates, however, that it is 'mildly disconcerting to discover that there is little consensus about precisely what the presumption of innocence means, that there is ardent debate about to

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[23] Beinart (1962) *Acta Juridica* 119.
[24] *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) para 24.
[25] L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 176-177.
[26] Summers (2001) *The Juridical Review* 38.
[27] See, for instance, the discussion in Schwikkard *Presumption of Innocence* 29-39, under the rubric: 'Towards a definition of the presumption of innocence'.
[28] At the time of writing, Laudan was a member of the Institute for Philosophical Research, National Autonomous University of Mexico.
[29] Quoting *Coffin v United States* 156 US 432 453 (1895).
[30] Laudan (2005) *Legal Theory* 334.

whom and when it applies, and that courts and legal scholars disagree about whether it stands on its own legs doctrinally or is simply an obvious, if nontrivial, consequence of the standard of proof.'[31] Similarly, Sarah Summers writes:[32]

> Asserted frequently and applied to substantiate countless different arguments, the presumption has attained an almost mythical status and consequently, has become practically indefinable. As such it has been the target of much criticism, which by concentrating on its rhetorical capacity, has failed to adequately determine its true function or to assess its value to the perception and the practice of the criminal law.

Summers goes on to note that the presumption of innocence is difficult to define and even harder to enforce, as the 'doctrine is both asserted and applied in a number of different ways, and is as such relied upon as the principle behind other more tangible rules.'[33]

Even though it may be assumed that the presumption of innocence 'is one of the least controversial rights', given that, as one commentator remarks, it 'finds a place in every known human rights document', the meaning and scope of the presumption are 'eminently contestable.'[34] PJ Schwikkard states in this regard that '[t]he presumption of innocence enjoys a wide acceptance both nationally and internationally as a fundamental principle of criminal justice.'[35] Schwikkard comments, however, that 'despite the laudatory rhetoric associated with the presumption of innocence there is little consensus regarding its contents and scope leading to considerable variation in respect of its normative value.'[36]

Several questions arise as to the meaning and scope of the presumption of innocence. Does the presumption merely denote the rule of the incidence or location of the burden of proof and the standard of proof at trial, or does it also have broader connotations or a wider meaning or field of operation? What aspects fall within the boundaries which define the presumption of innocence, and does the presumption have any practical significance for the accused? Does the presumption of innocence

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[31] *Ibid* 334.

[32] Summers (2001) *The Juridical Review* 38.

[33] *Ibid* 56-57. See, likewise, C Hamilton *The Presumption of Innocence in Irish Criminal Law: 'Whittling the Golden Thread'* (2007) 1.

[34] A Ashworth 'Four threats to the presumption of innocence' (2006) 10 *The International Journal of Evidence & Proof* 241 243. See also, for example, A Ashworth *Human Rights, Serious Crime and Criminal Procedure* (2002) 14; WS Laufer 'The Rhetoric of Innocence' (1995) 70 *Washington Law Review* 329 340: 'Even with near universal support and endorsement of the presumption of innocence, there has been a longstanding scholarly controversy over its exact meaning.'

[35] PJ Schwikkard 'The presumption of innocence: what is it?' (1998) 11 *South African Journal of Criminal Justice* 396 396.

[36] *Ibid* 396.

encompass many different elements including the requirement of judicial impartiality? If the presumption of innocence simply expresses, or constitutes a so-called proxy or synonym for, other key doctrines and precepts of criminal procedure and the law of evidence such as the prosecutorial burden or onus of proof and the standard of proof beyond a reasonable doubt, which must be met by the prosecution in order for the onus resting on it to be discharged, can the presumption of innocence not be said to be a superfluous or redundant doctrine? Or does the presumption of innocence stand alone, having an identity of its own; in order words, does it have meaningful, independent content and consequently a non-derivative function at trial (conceptually distinct from the principles of the burden and quantum of proof), with practical relevance for the accused as part of his or her right to a fair trial? One moreover often hears today persons accused of criminal wrongdoing asserting that they are 'innocent' until proven guilty. Is this mantra, however, a correct reflection of the meaning of the presumption of innocence?

A further pertinent question is whether the presumption of innocence is violated if the trial court at the commencement of the trial starts with the preconceived idea that the accused is guilty of the crime with which he or she has been charged as a result of adverse pre-trial publicity which paints the accused as guilty, or as a result of reported pronouncements of guilt by other courts in earlier related civil judgments (as averred in the *Krion* pre-trial motion where the applicant sought a stay of prosecution premised in part on this ground). Does the presumption include a consideration of the effects of adverse pre-trial media publicity either in relation to the question of its detrimental effect on the trial itself or outside the trial context? It is submitted that these questions are naturally crucial to determining the true scope or role of the presumption of innocence and the instances where the presumption is violated. As Sarah Summers notes: 'If the presumption of innocence is to have any practical value it is essential to determine the scope of its application.'[37] A key focus area, for present purposes, is whether, as is found in the jurisprudence of the European Court of Human Rights, the presumption of innocence in South African law extends to events leading up to trial, particularly the effects of any negative pre-trial publicity, and whether it has a so-called 'reputation aspect', protecting the image of the accused as 'innocent' before a guilty verdict by a court.

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[37] Summers (2001) *The Juridical Review* 52.

5.2 The narrow and wide meaning of the presumption of innocence

Several commentators or academic writers have identified two facets to the presumption of innocence, a narrow and broader construction.[38] Andrew Stumer[39] explains in this regard that:[40]

> The first [facet] is a rule applicable at trial that the burden of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt. This facet was described in *Woolmington v DPP* as the 'golden thread' of English criminal law. It is the more familiar aspect of the presumption of innocence, at least to common law lawyers, and it is sometimes treated as exhaustive of its content. The second facet is a more general principle that the treatment of the defendant throughout the criminal process should be consistent, as far as possible, with his or her innocence. Used in this broader sense, the presumption of innocence underpins the whole range of rules intended to ensure fairness to defendants. Specifically, the Strasbourg Court [European Court of Human Rights] has stated that it would be a breach of the presumption of innocence for a decision concerning the defendant to reflect his or her guilt prior to conviction. Hence, the refusal of bail pending trial, an order for confiscation of property without proof of an illegal source, and even the publication of the name of the defendant prior to conviction could be said to breach the presumption of

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[38] See Stumer *The Presumption of Innocence* xxxviii; P Healy 'Proof and Policy: No Golden Threads' (1987) *The Criminal Law Review* 355 364-365; Schwikkard *Presumption of Innocence* 35-36 (Schwikkard (1998) *SACJ* 403; PJ Schwikkard 'Evidence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 52-11); Summers (2001) *The Juridical Review* 52-57; Laudan (2005) *Legal Theory* 334; Ashworth (2006) *The International Journal of Evidence & Proof* 243-244; M Redmayne 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *Oxford Journal of Legal Studies* 209 218-219; A Owusu-Bempah *Penalising Defendant Non-Cooperation in the Criminal Process and the Implications for English Criminal Procedure* PHD Thesis University College London (2012) 97; A Owusu-Bempah 'Defence participation through pre-trial disclosure: issues and implications' (2013) 17 *The International Journal of Evidence & Proof* 183 196; I Dennis 'The Human Rights Act and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333 354.

See also A L-T Choo *The Privilege Against Self-Incrimination and Criminal Justice* (2013) 25, where the following crisp distinction between the narrow and wider conceptions of the presumption of innocence is given:

> 'In its narrower conception, the presumption of innocence relates to the duty of the prosecution, at the trial, to prove the guilt of the defendant, who, until the time of the verdict, is therefore to be presumed innocent. This may be viewed as a means of providing an innocent defendant with protection from wrongful conviction. A broader conception of the presumption, however, treats it as applicable not only at the trial stage but, additionally, beyond the trial as a direction to officials to treat the suspect as if he were innocent at all stages until guilt is proven. From a normative standpoint, it implies that the accused should not have to play a role in the state's obligation to account for its accusations.' (Footnote omitted).

See too the discussion in Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 259-279; Hamilton *The Presumption of Innocence in Irish Criminal Law* 1-9; R Kitai 'Presuming Innocence' (2002) 55 *Oklahoma Law Review* 257; F Quintard-Morénas 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 *The American Journal of Comparative Law* 107; PR Ferguson 'The Presumption of Innocence and its Role in the Criminal Process' (2016) 27 *Criminal Law Forum* 131.

[39] At the time of writing, Stumer was a practising barrister in Brisbane, Australia.

[40] Stumer *The Presumption of Innocence* xxxviii-xxxix (footnotes omitted).

> innocence. In the same vein, the Strasbourg Court has stated that the right to silence and privilege against self-incrimination are closely associated with the presumption of innocence.

Andrew Ashworth similarly notes that the presumption of innocence 'appears to operate at two different levels - one is the criminal trial, the other is the criminal process more generally.'[41] The writer amplifies the two interpretations of the presumption thus:[42]

> The former, narrower, conception is the familiar principle that, where a person is charged with a criminal offence, the prosecution bears the burden of proving guilt of that offence, and that proof must be beyond reasonable doubt. But European human rights law also supports a second, wider, sense of the presumption of innocence: that pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent. This sense of the presumption acts as a restraint on the various compulsory measures that may properly be taken against suspects in the period before trial.
>
> The second interpretation is evident in the principle of European human rights law that compulsory detention is only justifiable if there is at least 'reasonable suspicion' that the detainee has committed an offence, and that even then the detainee must be 'brought promptly before a judge'. European human rights law makes it clear that when a court is considering whether to grant the defendant bail or to remand in custody pending trial, the presumed innocence of the defendant should be the starting point and, it follows, strong and specific reasons for depriving the defendant of liberty are required. The wider sense of the presumption of innocence concerns the State's duty to recognise the defendant's legal status of innocence at all stages prior to conviction… [T]his interpretation is supported by the same arguments about the proper relationship between the State and suspects and defendants as the narrower and more familiar sense of the presumption. A further application of the wider sense of the presumption is what Stefan Trechsel refers to as its 'reputation-related' aspect - that no public figure should make statements imputing guilt to the defendant before trial and conviction, and that in principle a court should not require an acquitted defendant to pay the costs of the trial. These, too, concern due respect for the legal status of innocence.[43]

Commenting elsewhere on Article 6(2) of the European Convention on Human Rights which entrenches the fundamental right of everyone charged with a criminal offence to be presumed innocent according to law, Ashworth writes that even though the right to be presumed innocent until convicted is an 'apparently simple right', it 'has a number of ramifications', pointing 'in at least two different directions.'[44] Ashworth observes in this respect that the presumption of innocence 'has reference

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[41] Ashworth (2006) *The International Journal of Evidence & Proof* 243.
[42] *Ibid* 243-244 (footnotes omitted) (author's emphasis).
[43] See S Trechsel *Human Rights in Criminal Proceedings* (2006) 178-191, for the discussion on the 'reputation-related aspect' of the presumption of innocence.
[44] Ashworth *Human Rights, Serious Crime and Criminal Procedure* 14.

to the treatment of suspects and defendants before and during the trial, insisting that such treatment must be consistent with respect for their innocence', with one notable example being 'the presumption in favour of bail for persons charged with an offence'.[45] Ashworth states further that the presumption of innocence 'also has reference to the logistics of proof in criminal cases - which party must prove what'.[46] Focusing on the latter aspect of the right to be presumed innocent, Ashworth notes that '[t]he general principle, stated in English law and adopted in European human rights law, is that the prosecution should bear the burden of proving the accused's guilt, and that guilt should be proved to the standard "beyond reasonable doubt" rather than on a simple balance of probabilities. One way of expressing this is that a defendant has the right to put the prosecution to proof, and should not be required to exculpate himself or otherwise disprove guilt just because he has been charged with an offence. Whether phrased as the presumption of innocence or as the principle of putting the prosecution to proof, the essence seems to reside in the relationship between the State and the citizen, and the idea of respect for the liberty of citizens.'[47]

PJ Schwikkard indicates that '[n]arrowly formulated the presumption of innocence contains two components: (1) a rule requiring the state to bear the burden of proof and (2) a directive that the burden will only be discharged when guilt has been proved beyond reasonable doubt.'[48] In terms, then, of this narrow reading of the presumption of innocence, as recognised in common-law jurisdictions,[49] the presumption is a normative principle that applies in the criminal trial and merely gives expression to, or is simply another way of expressing, the common-law evidentiary rule putting the burden of proving guilt beyond a reasonable doubt on the prosecution.[50] The presumption of innocence serves as 'a reminder that affirmative

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[45] *Ibid* 14.
[46] *Ibid* 14.
[47] *Ibid* 14-15 (footnote omitted).
[48] Schwikkard *Presumption of Innocence* 29.
[49] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 260, discussing the presumption of innocence as a common-law rule of evidence.
[50] See, for example, Williams *The Proof of Guilt* 184; *Wigmore on Evidence* Volume 9 § 2511; JB Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898) [Reprint Edition: 1969] 557-560, 565; Allen *Legal Duties* 253-294; JC Morton & SC Hutchison *The Presumption of Innocence* (1987) 2, 7-8; Hamilton *The Presumption of Innocence in Irish Criminal Law* 1; JW Strong (gen ed) *McCormick on Evidence: Volume 2* 4 ed (1992) 453; A Ashworth & M Blake 'The Presumption of Innocence in English Criminal Law' (1996) *The Criminal Law Review* 306; P Roberts 'Taking the Burden of Proof Seriously' (1995) *The Criminal Law Review* 783 783 (noting that the 'elementary feature of adversarial criminal procedure that the prosecution bears the burden of proving the defendant's guilt beyond reasonable doubt… gives practical effect to the "presumption of

allegations must be proved by those who make them, not disproved by those against whom they are made.'[51] The narrow common-law meaning of the presumption of innocence was given definitive articulation in England in the well-known House of Lords decision of *Woolmington v The Director of Public Prosecutions*, where Viscount Sankey declared:[52]

> [I]t is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence…
>
> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[53]

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innocence"'); Summers (2001) *The Juridical Review* 43-44, 49-50, 52-54; Quintard-Morénas (2010) *The American Journal of Comparative Law* 141-146; BM Sheldrick 'Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses' (1986) 44 *University of Toronto Faculty of Law Review* 179 180-181; PW Hogg *Constitutional Law of Canada: Volume 2* 5 ed (2007) 539-540 (para 51.5(a)); Steytler *Constitutional Criminal Procedure* 133-134, 321; *R v Appleby* (1972) 3 CCC (2d) 354 (SCC) para 33 (Westlaw) ('The "right to be presumed innocent"… is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted'); *R v Dubois* (1986) 22 CCC (3d) 513 (SCC) paras 41-42 (Westlaw); *R v Oakes* (1986) 24 CCC (3d) 321 (SCC) paras 33, 35 (Westlaw); *Bell v Wolfish* 441 US 520 533 (1979); *In re Winship* 397 US 358 363 (1970); *Slater v HM Advocate* 1928 JC 94 105.

[51] Allen *Legal Duties* 293-294. See also Summers (2001) *The Juridical Review* 52.

[52] (1935) AC 462 481-482.

[53] In *S v Zuma and Others* 1995 1 SACR 568 (CC) para 25, it was observed that the presumption of innocence was 'forcefully restated by Viscount Sankey in his celebrated speech in *Woolmington v Director of Public Prosecutions*'. It is pointed out in Ashworth & Blake (1996) *The Criminal Law Review* 306, that '[f]rom time to time English judges have articulated fundamental principles which they believe to underlie English criminal law and procedure.' According to these writers, '[p]erhaps best known is the declaration of Viscount Sankey L.C. in *Woolmington v. DPP* (1935) that "throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt".' (*Ibid* 306). Sarah Summers comments that this statement by Viscount Sankey is the 'most well known exposition of the position of the burden of proof and the presumption of innocence in an English criminal case' - Summers (2001) *The Juridical Review* 49.

See also *R v Director of Public Prosecutions, Ex parte Kebilene and Others* (2000) 2 AC 326 377, reaffirming *Woolmington* and the Scottish decision of *Slater v HM Advocate* 1928 JC 94 105 as to the presumption of innocence doctrine. For a discussion on the significance of *Slater*, see Summers (2001) *The Juridical Review* 48, 53-54.

Charles RM Dlamini[54] argues, however, that it is incorrect to equate the presumption of innocence with the reasonable doubt rule 'for the presumption of innocence is a tactical rule aimed at the proper allocation of the [onus of proof] at the trial in respect of issues raised whereas the reasonable doubt rule is an evidence-evaluating rule aimed at prescribing the quality and quantity of evidence required to be adduced to enable the state to succeed.'[55] Sarah Summers suggests though that 'the presumption of innocence is less concerned with the concept that the burden of proof rests on the prosecution, and more with how that burden is discharged.'[56] Byron M Sheldrick notes that 'the presumption of innocence and the reasonable doubt standard are so closely inter-related, any tinkering with the allocation of burdens of proof in a criminal proceeding risks altering the normal relationship between the accused and the state', thereby violating the right to be presumed innocent.[57]

Whether it is correct or not to effectively conflate the reasonable doubt rule with the presumption of innocence, the 'general conception' of the presumption 'as a common law rule of evidence' is as follows, as summarised by Hock Lai Ho:[58] 'first, the presumption is described in terms of the burden and standard of proof, as a general rule that places on the prosecution the burden of proving guilt to the standard of beyond reasonable doubt; secondly, this rule regulates verdict deliberation and shapes the conduct of the trial; thirdly, it is free-standing, a standard of fair trial that is conceptually separate from other such standards.'[59] Ho elucidates these salient features of the presumption thus:[60]

> The presumption assigns to the prosecution the burden of proving every element of the crime with which the accused is charged, and, subject to certain exceptions, of disproving any

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[54] At the time of writing, Dlamini was Rector and Vice-Chancellor: University of Zululand, Advocate of the High Court of SA, and part-time member of the Human Rights Commission.

[55] CRM Dlamini 'Proof beyond a reasonable doubt: an analysis of its meaning and ideological and philosophical underpinnings' (1998) 11 *South African Journal of Criminal Justice* 423 425 (footnote omitted).

[56] Summers (2001) *The Juridical Review* 37; see the writer's argument in this respect: *ibid* 48, 53-54.

[57] Sheldrick (1986) *University of Toronto Faculty of Law Review* 181, with reference to section 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which provides: 'Any person charged with an offence has the right… to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'. See also *R v Lifchus* (1997) 118 CCC (3d) 1 (SCC) para 13 (Westlaw):

> 'The onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence.'

[58] Ho is Amaladass Professor of Criminal Justice at the National University of Singapore.

[59] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 260.

[60] *Ibid* 260 (footnote omitted).

> defence that has been put in issue. The prosecution will secure a guilty verdict only if it discharges this burden beyond reasonable doubt on all the evidence adduced at the trial.
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> On this view, the presumption is a rule that regulates the criminal trial. It puts the risk of non-persuasion on the prosecution, sets out what each side must do in order to get the verdict that it wants and tells the judge (or the jury where there is one) of the preconditions that must be met to warrant a conviction and of the "default" decision in verdict deliberation. Less directly, the presumption influences the selection of evidence to present before (or withhold from) the court, informs the approach counsel take to the examination of witnesses, and, more generally, shapes trial strategies and argumentation.
>
> There are many rules regulating the criminal trial, and only some of them are so important that their absence renders a trial fundamentally unfair. The presumption of innocence is one such rule. It is a standard of fair trial, and it is independent of other standards. A trial is fundamentally unfair where the court is biased or the accused is denied the opportunity to examine the witnesses against her; but – so it is said – these aspects of unfairness, taken separately or together, do not amount to a violation of the right to be presumed innocent.

In this context, Ian Dennis[61] observes that: 'Allocation of the burden of proof to the prosecution provides a safeguard against conviction of the innocent.'[62] The presumption of innocence 'is necessary to reduce the possibility of erroneous convictions.'[63] 'The protection of the innocent against wrongful conviction is clearly a fundamental objective of the presumption of innocence. The prosecution carries a heavy burden of proof so as to minimize the risk of wrongful conviction.'[64] James C Morton[65] and Scott C Hutchison,[66] writing from a Canadian perspective, observe that the definition of the presumption of innocence that the burden is on the prosecution

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[61] At the time of writing, Dennis was Professor of Law, University College London and Visiting Professor, University of Sydney.

[62] Dennis (2011) *Sydney Law Review* 354.

[63] Schwikkard (1998) *SACJ* 407. See also Schwikkard *Presumption of Innocence* 16; *S v Baloyi* 2000 1 SACR 81 (CC) para 15: 'In open and democratic societies that have adversarial criminal justice systems similar to ours, the centrality of this right [to be presumed innocent] to a just criminal process has been strongly emphasised. The requirement that the State must prove guilt beyond a reasonable doubt has been called the golden thread running through the criminal law, and a prime instrument for reducing the risk of convictions based on factual error.' (Footnote omitted).

[64] D Hamer 'A Dynamic Reconstruction of the Presumption of Innocence' (2011) 31 *Oxford Journal of Legal Studies* 417 420. See also Sheldrick (1986) *University of Toronto Faculty of Law Review* 180, stating that '[b]y imposing such a heavy burden on the prosecution, the reasonable doubt standard skews the trial process in favour of the accused and reduces the possibility of erroneously convicting an innocent defendant.' See too, for instance, *In re Winship* 397 US 358 363-364, 372 (1970); Morton & Hutchison *The Presumption of Innocence* 5. For a contrary view on the need for a high standard of proof in criminal matters, as embodied in the rule of proof beyond a reasonable doubt, see L Laudan 'The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?' in L Green & B Leiter (eds) *Oxford Studies in Philosophy of Law: Volume 1* (2011) 195 195-222.

[65] At the time of writing, Morton was of the Law Society of Upper Canada.

[66] At the time of writing, Hutchison was of the Law Society of Upper Canada.

to prove its case against the accused beyond a reasonable doubt, 'is in accordance with the rationale for the presumption of innocence – it forbids conviction except upon evidence adduced in court and resolves any doubts as to the guilt of the accused in his favour.'[67]

Wigmore pointed to a further feature of the presumption of innocence in the common law, namely that it conveys a special and perhaps useful hint to the arbiter over and above the rule about the burden of proof, in that it cautions the arbiter to put away from his or her mind all the suspicion that may arise from the arrest, the indictment, and the arraignment of the accused, and to reach his or her verdict solely from the legal evidence adduced at trial.[68] Wigmore amplified the point thus, in relation to the jury as arbiter:[69]

> In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps *only an implied corollary to the other*) to consider, in the material for their belief, *nothing but the evidence, i.e.,* no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases…

On the latter facet of the presumption of innocence, and with reference to Wigmore, the United States Supreme Court explained in *Taylor v Kentucky* that an accused is

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[67] Morton & Hutchison *The Presumption of Innocence* 8. See further the writers' discussion of the rationales for the presumption of innocence: *ibid* 2-6. For additional reading on the rationale underlying the presumption of innocence, see, for example, Schwikkard *Presumption of Innocence* 10-16; Stumer *The Presumption of Innocence* 27-40. In the leading decision of *R v Oakes* (1986) 24 CCC (3d) 321 (SCC) para 32 (Westlaw), Dickson CJC underscored the vital importance of the presumption of innocence in preventing wrongful convictions, as follows:

> 'The presumption of innocence is a hallowed principle lying at the very heart of criminal law… The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.'

These observations in *Oakes* have been endorsed by South African courts; see *S v Zuma and Others* 1995 1 SACR 568 (CC) para 22; *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 121 (per Madala J, holding that: 'The requirement that the accused should prove his or her innocence appears to run counter to the presumption of innocence which is foundational in our principles of the criminal law'); *S v Shangase and Another* 1994 2 SACR 659 (D) 664*i*-665*c*; *S v Mumbe* 1997 1 SACR 46 (W) 49*f*-*g*; *S v Fransman* 2000 1 SACR 99 (W) 101*d*-*e*. For alternative aims of the presumption of innocence, see RL Lippke 'Justifying the proof structure of criminal trials' (2013) 17 *The International Journal of Evidence & Proof* 323; Hamer (2011) *Oxford Journal of Legal Studies* 417.

[68] *Wigmore on Evidence* § 2511.

[69] *Ibid* § 2511 (author's and my emphasis).

entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, 'and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'[70] In this sense, the presumption of innocence represents a means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial; guilt is to be established by probative evidence and beyond a reasonable doubt.[71] The presumption of innocence in Anglo-American jurisprudence thus performs a two-fold function in the criminal process: firstly, it serves as a reminder of the rule regarding the location and standard of the burden of proof, and secondly, it admonishes the adjudicator to reach his or her decision solely from the evidence produced at trial and not on any other factors.[72] The latter function of the presumption of innocence is, however, a '*corollary* of the burden of proof rule', whereby the trier of fact should not improperly infer an accused's guilt from the '*accused's circumstances*.'[73]

The Supreme Court of Canada, with reference to sections 7,[74] 11(*d*)[75] and 11(*e*)[76] of the *Canadian Charter of Rights and Freedoms*, has pointed out that the operation of the presumption of innocence at trial does not exhaust the operation in the criminal process of the presumption as a substantive principle of fundamental justice that protects the liberty and human dignity of a person accused by the State of criminal conduct; that the presumption 'is an animating principle throughout the criminal justice process' including in relation to the question of bail; that the fact that the presumption comes to be applied in its strict evidentiary sense at trial pursuant to section 11(*d*) of the *Charter*, 'in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be

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[70] 436 US 478 485 (1978). See also, for example, Schwikkard *Presumption of Innocence* 29, 32-33; Wilson (1981) *Hastings Constitutional Law Quarterly* 731-732.

[71] *Taylor v Kentucky* 436 US 478 486 (1978).

[72] *United States v Thaxton* 483 F.2d 1071 1073 (1973). See also *Bell v Wolfish* 441 US 520 533 (1979); Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 272, adding in this regard that the accused is to start a trial with a 'clean probatory slate'.

[73] D Kiselbach 'Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence' (1989) 31 *Criminal Law Quarterly* 168 175 (my emphasis).

[74] 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[75] 'Any person charged with an offence has the right… to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

[76] 'Any person charged with an offence has the right… not to be denied reasonable bail without just cause'.

that the person is innocent.'[77] The presumption of innocence is therefore integral not only to the trial stage, where the accused's guilt of an offence is in issue, but also to the principle of fundamental justice in the criminal process and to the question of bail; hence, the presumption is an active principle at all stages of the criminal justice process.[78] Section 11(*d*) of the *Charter* ensures that the presumption of innocence operates at trial, where the guilt or innocence of the accused is to be established.[79] Section 11(*d*) entrenches the 'effect' of the presumption of innocence at the trial stage,[80] namely that the burden is on the prosecution to prove the guilt of the accused beyond a reasonable doubt.[81] But the presumption also plays a role before trial; the presumption protects the fundamental liberty of every person that comes into contact with the criminal justice system.[82] And section 11(*e*) of the *Charter*, entrenches the 'effect' of the presumption at the stage of the bail hearing in relation to its 'procedural content',[83] namely that the burden is on the prosecution to show why pre-trial detention is justified and that bail ought accordingly to be denied.[84] A distinction is drawn between the content of the presumption of innocence in its broader application as a substantive principle of fundamental justice and its operation at trial.[85] At trial, the presumption of innocence creates a procedural and evidentiary rule that the prosecution must prove guilt beyond a reasonable doubt.[86] However, this procedural and evidentiary rule has no application at the bail stage of the criminal process, where the guilt or innocence of the accused is not determined

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[77] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) paras 33, 45 (Westlaw). See also *R v Oakes* (1986) 24 CCC (3d) 321 (SCC) para 32 (Westlaw).

[78] WP de Villiers *Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and Proposals for Reform* LLD Thesis University of Pretoria (2000) 217. See also *R v Morales* (1992) 77 CCC (3d) 91 (SCC) para 70 (Westlaw).

Wium de Villiers' observations on the application of the presumption of innocence outside the trial context under Canadian and South African law have also been published respectively in W de Villiers 'The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 1)' (2002) 35 *De Jure* 92 95-99, and W de Villiers 'The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 2)' (2002) 35 *De Jure* 195 197-199.

[79] De Villiers *Problematic Aspects of the Right to Bail under South African Law* 252.

[80] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 45 (Westlaw).

[81] *Ibid* para 42 (Westlaw).

[82] De Villiers *Problematic Aspects of the Right to Bail under South African Law* 252.

[83] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 45 (Westlaw); De Villiers *Problematic Aspects of the Right to Bail under South African Law* 221, 252.

[84] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 58 (Westlaw); Schwikkard *Presumption of Innocence* 82-83. See also *R v Morales* (1992) 77 CCC (3d) 91 (SCC) paras 36, 70 (Westlaw); Kiselbach (1989) *Criminal Law Quarterly* 191, 194-196, suggesting that the presumption of innocence at the bail stage imposes an onus on the State to show why pre-trial detention is necessary.

[85] Schwikkard *Presumption of Innocence* 80.

[86] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 42 (Westlaw).

and where punishment is not imposed.[87] At the bail stage, the presumption of innocence creates the legal rule that the accused is to be presumed 'legally innocent',[88] which must mean that the 'starting point' on the question of bail is that the accused is to be treated as or 'assumed' to be innocent[89] – that is, treated as a person whose guilt has still to be determined by a competent court pursuant to a fair and regular adjudicative proceeding.[90] In other words, a court which must make a determination on bail would be required, in the treatment of the accused, to ignore indicators of guilt or the presumption of guilt on which the invocation of the criminal process is premised.[91] In addition to this, procedurally, the prosecution would bear the onus of proving why the denial of bail would be justifiable.[92] Insofar as section 7 of the *Charter* is concerned, the presumption of innocence, as a substantive principle of fundamental justice, means that 'the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person.'[93]

The position in South Africa is different to the aforesaid Canadian approach as to the contents of the presumption of innocence. It is so that in both legal systems the presumption of innocence as a constitutional right regulating the burden and standard of proof at trial has no application in bail proceedings.[94] However, the Constitutional Court's interpretation of section 35(1)(*f*) of the South African Constitution (which grants an arrested person the right 'to be released from detention *if the interests of justice permit*'),[95] would seem to suggest that an accused bears the onus to establish that the interests of justice permit his or her release on bail, albeit that the Court left the aspect unresolved.[96] This is evident from the wording of section 35(1)(*f*), as aforesaid, the default position of which is not that an arrested person is entitled to be released on bail 'unless the interests of justice require

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[87] *Ibid* para 42 (Westlaw). See also *R v Morales* (1992) 77 CCC (3d) 91 (SCC) para 33 (Westlaw).
[88] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 45 (Westlaw).
[89] *Ibid* para 37 (Westlaw).
[90] Schwikkard *Presumption of Innocence* 34-35. See also Kiselbach (1989) *Criminal Law Quarterly* 177, 187-188, 191, 193, 195-196.
[91] Schwikkard *Presumption of Innocence* 29-30, 35, with reference to Packer *The Limits of the Criminal Sanction* 161.
[92] Schwikkard *Presumption of Innocence* 83.
[93] *R v Pearson* (1992) 77 CCC (3d) 124 (SCC) para 37 (Westlaw). See also De Villiers *Problematic Aspects of the Right to Bail under South African Law* 217-218.
[94] Schwikkard *Presumption of Innocence* 83.
[95] My emphasis.
[96] See *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) para 45.

otherwise', but that the detention of the arrested person is to continue '*unless* there is sufficient material to establish that the interests of justice do permit the detainee's release.'[97] Thus, in contrast to the Canadian position where an accused is entitled to be released on bail unless the prosecution proves why the denial of bail would be justifiable, the effect of the presumption of innocence insofar as its procedural content or requirement is concerned of placing an onus on the State,[98] would not apply in a bail hearing under South African law.[99] Moreover, the policy directive that a subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial, 'is no doubt a logical *consequence*' of the first facet of the presumption of innocence (described above), namely the rule regulating the location and standard of the burden of proof at trial.[100] This is by reason of the fact that 'if it is stipulated that guilt is dependent on the prosecution proving its case beyond a reasonable doubt *it follows that a person must be treated as if innocent* until the state has discharged its burden of proof.'[101] PJ Schwikkard reiterates in this respect that:[102]

> A logical consequence of the presumption of innocence is that persons are not to be treated as guilty until the state has discharged its burden of proving all the elements of the offence charged beyond a reasonable doubt. In addition the doctrine of legal guilt requires that these factual determinations be made in a procedurally regular fashion. If a person is not to be found guilty until these requirements have been met it follows that all pre-trial processes must take the *legal innocence* of a person into account. But this does [not] mean that a finding of guilt is a pre-condition for depriving a person of his or her privacy and/or freedom and security of person. Arrest, detention, search and seizure are all permissible prior to a finding of guilt provided there are reasonable grounds for doing any of these acts. It is the *status of a person as legally innocent* together with the right not to be deprived of freedom arbitrarily or without just cause that demands the existence of reasonable grounds.

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[97] *Ibid* para 45 (my emphasis). Compare also Schwikkard *Presumption of Innocence* 76. Of course, section 60(11) of the Criminal Procedure Act, the provisions of which have been found by the Constitutional Court to pass constitutional muster, places an onus on the accused, respectively in respect of Schedule 5 and 6 offences, to adduce evidence which satisfies the court that the interests of justice permit his or her release on bail or that 'exceptional circumstances' exist which in the interests of justice permit his or her release on bail – see *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) paras 65, 78-80. See also, for example, *S v Mathebula* 2010 1 SACR 55 (SCA) paras 12-13; *S v Mbaleki and Another* 2013 1 SACR 165 (KZD).

[98] See S van der Merwe 'Die grondwetlike passiewe verdedigingsreg versus die bewysregtelike gevolge van swye aan die einde van die staatsaak' (1997) 10 *South African Journal of Criminal Justice* 262 268.

[99] Schwikkard *Presumption of Innocence* 83.

[100] *Ibid* 35-36 (my emphasis).

[101] *Ibid* 36 (my emphasis). See also Schwikkard (1998) *SACJ* 403, 405-406.

[102] Schwikkard *Presumption of Innocence* 79-80 (footnotes omitted) (my emphasis).

> *The distinction between the presumption of innocence as a rule regulating the burden of proof and the concept of legal innocence is not merely semantic*. *Common sense* requires us to distinguish the constitutional right to be presumed innocent in s 35(3)(*h*) [of the Constitution], from *inter alia:* s 35(1)(*f*) - the right to be released from detention if the interests of justice permit; s 12(1)(*a*) - the right not to be deprived of freedom arbitrarily or without just cause; s 14(*a*) & (*b*) - the right not to have person, home or property searched. The *separate enumeration of these rights is a clear indication of the legislative recognition that the parameters of these rights are subject to varying policy considerations requiring separate application and treatment* if the values underlying them are not to be compromised. One of the parameters of these rights is determined by the *assumption of innocence*.

A further distinction between the South African position and the Canadian approach is that the South African Constitutional Court has, according to Schwikkard, given the residual contents of the right to freedom and security of the person in terms of section 12(1) of the Constitution, 'scant attention.'[103] The implied reasoning would appear to be as follows: once there has been a lawful arrest, section 12 of the Constitution is no longer relevant, the constitutionality of the accused's continued detention being determined by section 35(1)(*f*).[104] Thus, the presumption of innocence, under the right to a fair trial, is not integral to section 12 of the Constitution.[105]

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[103] *Ibid* 83.

[104] *Ibid* 83.

[105] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 185, Chaskalson P, writing for the majority Court, noted that whilst section 7 of the *Canadian Charter of Rights and Freedoms* guarantees the right of everyone not to be deprived of life, liberty and security of the person except in accordance with the principles of 'fundamental justice', which latter term is construed as obviously requiring that a person accused of a crime should receive a fair trial, the right to freedom and security of the person enshrined in the South African Constitution (*in casu*, section 11(1) of the interim Constitution) contains no comparable requirement of 'fundamental justice'. Thus, Chaskalson P went on to find that in the context of the South African Constitution, and having regard to the specific wording of the provision protecting the right to freedom and security of the person, and the fact that the right to a fair trial is dealt with 'specifically and in detail' under a separate section of the Constitution, he could not read the right to freedom and security of the person 'as including a residual fair trial right.' (*Ibid* para 185). See also *Ferreira* supra para 41 (where Ackermann J held that fair trial rights 'accrue, textually, only to "every accused person". They are rights which accrue, in the subjective sense, when a person becomes an "accused person" in a criminal prosecution'); Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-13-51-14; *Nel v Le Roux NO and Others* 1996 1 SACR 572 (CC) paras 11-14; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) paras 17-28, 64. However, for contrary indications as to the interaction between fair trial rights in the Bill of Rights and other rights in the Bill, see *S v Boesak* 2001 1 SACR 1 (CC) paras 37-39; *Bothma v Els and Others* 2010 1 SACR 184 (CC) paras 32-33; W de Villiers 'Fair trial rights, freedom of the press, the principle of "open justice" and the power of the Supreme Court of Appeal to regulate its own process: South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others 2007 (2) BCLR 167 (CC)' (2007) 11 *Law, Democracy & Development* 99 106-108.

In Schwikkard *Presumption of Innocence* 71, it is observed that if the majority view in *Ferreira's* case supra is followed, the right to freedom and security of the person does not include the residual right to a fair trial, and the specific rights enumerated under the right to a fair trial provision in

Nico Steytler opines, similarly to Schwikkard, that the right to bail should not be seen as a consequence or expression of the right to be presumed innocent contained in section 35(3)(*h*) of the Constitution.[106] This is because '[t]he presumption of innocence is *confined to procedural and evidential issues, burdening the state with the onus of proving an accused guilty beyond reasonable doubt*.'[107] Steytler espouses the American and Canadian approach of limiting the right to be presumed innocent 'to evidential and procedural issues', as '[t]he presumption has no factual basis and *merely establishes the process by which guilt is to be determined*.'[108] Steytler observes, therefore, that the right to be released on bail and the right to be presumed innocent ought to be viewed as 'parallel rights', giving effect to the same principle at different stages of the criminal process and in different forms, namely that interference with the accused's freedom should be minimised and the accused should not be subjected to punishment or anticipatory punishment before being convicted of an offence.[109]

In the circumstances, it is submitted that Schwikkard's[110] and Steytler's view that the right to be presumed innocent under South African law is constitutionally

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the Constitution, including the presumption of innocence, 'only have clear constitutional status in regard to the right to a fair trial.' Schwikkard argues, nevertheless, that if in a proceeding other than a criminal trial, imprisonment may be imposed as a penalty, 'the residual contents' of section 12(1) of the final Constitution (which entrenches the right to freedom and security of the person) should incorporate the rule of proof beyond a reasonable doubt 'as a requirement of procedural fairness', in order to 'reduce the possibility of an erroneous finding where imprisonment is a consequence of such findings.' (*Ibid* 75, 84). In other words, 'there maybe circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence.' (*Ibid* 84). Schwikkard concludes that '[w]hen imprisonment as a form of punishment is a possible result of "other proceedings" [that is, other than criminal proceedings] the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard.' (*Ibid* 84).

In *S v Baloyi* 2000 1 SACR 81 (CC) para 23, Sachs J, for the Court, observed that a person who faces conviction and sentence in the form of a fine or imprisonment 'is an "accused person" as contemplated by s 35(3)(*h*) of the Constitution, and entitled to the benefit of the presumption of innocence.'

[106] Steytler *Constitutional Criminal Procedure* 134. For a contrary view on the role that the presumption of innocence plays on the question of bail, see, for example, S van der Merwe 'Bail' in E du Toit, F de Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 9-5-9-7; Van der Berg *Bail* 19-25; MT Mokoena *A Guide to Bail Applications* (2012) 37; D van Zyl 'Pre-Trial Detention in South Africa: Trial and Error' in PH van Kempen (ed) *Pre-Trial Detention: Human rights, criminal procedural law and penitentiary law, comparative law: Détention Avant Jugement: Droits de l'homme, droit de la procédure pénale et droit pénitentiaire, droit comparé* (2012) 661 675; *S v Jacobs* 2011 1 SACR 490 (ECP) para 12.

[107] Steytler *Constitutional Criminal Procedure* 134 (my emphasis).

[108] *Ibid* 321 (my emphasis).

[109] *Ibid* 133-134. Compare also, for example, *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 33, where Sachs J held that the constitutional right to a fair trial 'protects freedom in the context of the application of criminal law.'

[110] See Schwikkard *Presumption of Innocence* 84.

specified in relation to the right to a fair trial, and that it therefore does not apply to proceedings outside the definition of a criminal trial, is a correct one. Courts have similarly found that the presumption of innocence, as a constitutional fair trial right, does not operate outside the trial context or at the pre-trial stage.[111] In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*, the Constitutional Court noted that the reverse onus placed on an accused to establish 'exceptional circumstances' to be released on bail, in terms of section 60(11)(*a*) of the Criminal Procedure Act, does not give rise to a risk of a wrong conviction or the risk of a conviction despite the existence of a reasonable doubt (the objection that lies at the root of the unacceptability of reverse onuses), but merely places on the accused, in whose knowledge the relevant factors lie, 'an *onus* to establish them in a special kind of interlocutory proceeding *not geared to arriving at factual conclusions* but designed to make informed prognoses.'[112] The Court thus indirectly made clear that the presumption of innocence does not apply in bail applications.[113] After all, the central rationale of the presumption of innocence is that the presumption 'is necessary to reduce the possibility of erroneous convictions.'[114] And it is firmly entrenched in the constitutional right to be presumed innocent that there is no reverse onus on the accused to prove his or her innocence or to disprove an element of a crime on a balance of probabilities; the presumption of innocence is breached whenever a legal burden is placed on an accused which could result in a conviction despite the existence of a reasonable doubt as to the accused's guilt.[115]

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[111] See *S v Mbaleki and Another* 2013 1 SACR 165 (KZD) para 14; *S v Shabangu* 2014 JDR 2171 (GP) para 20, where, pertaining to the question of bail, it was pointed out that: 'The issue of guilt or innocence of the appellants will be dealt with by the trial court. Therefore the reliance by the appellants on the appellants' right to be presumed innocent until proven guilty does not have a bearing on the bail application proceedings.'

[112] 1999 2 SACR 51 (CC) para 78 (my emphasis).

[113] For a contrary stance, see Van der Merwe 'Bail' in *Commentary on the Criminal Procedure Act* 9-6.

[114] Schwikkard *Presumption of Innocence* 16.

[115] See *S v Zuma and Others* 1995 1 SACR 568 (CC); *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC); *S v Mbatha; S v Prinsloo* 1996 1 SACR 371 (CC); *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) paras 6-7, 12; *S v Baloyi* 2000 1 SACR 81 (CC) para 15; *S v Singo* 2002 2 SACR 160 (CC) paras 25-26; *R v Ndhlovu* 1945 AD 369 386; *S v Carstens* 2012 1 SACR 485 (WCC) para 13, quoting with approval *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 3 SA 79 (T) 88I-89D, where the common-law position was enunciated thus:

> 'Conviction beyond reasonable doubt is what the State must achieve before it succeeds in making "the wall of guilt fall on the accused"; it is unnecessary for the accused to push any part of that wall over onto the side of the State. An accused will accordingly be discharged if the State's case is not strong enough and, according to principle, it will sometimes be sufficient if the accused does nothing at all and sometimes it will be sufficient if he relies on pointing out the weaknesses in the State case (by, eg, cross-examination which exposes the

It would seem that it was in this light that the Court interpreted *Dlamini's* decision supra in the case of *S v Mbaleki and Another*, when it held that *Dlamini* is authority for the principle that 'the right to be presumed innocent is not a pre-trial right, but a trial right.'[116] PJ Schwikkard points out that as a result of the distinction drawn by the Constitutional Court in *Dlamini* between bail and trial proceedings, 'the constitutional right to be presumed innocent was not in issue.'[117]

It is submitted that Wium de Villiers correctly observes that those who after the advent of the fundamental rights era, have understood the presumption of innocence to apply outside trial, have not always appreciated that it is '*only* the *effect*' of the presumption '*at trial* that is entrenched by [section 35(3)(*h*)] in the Constitution.'[118]

It is submitted that when Legodi J in *S v DV and Others* interpreted the presumption of innocence with regard to a bail proceeding, as being that an accused 'must be regarded as innocent until proven guilty in a court of law',[119] he clearly had in mind the logical *consequence* of the presumption that an accused is to be treated as innocent at all stages of the criminal process before conviction.[120] This is to equate the presumption of innocence with Herbert Packer's concept of 'legal guilt', meaning that 'until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.'[121] If the presumption of innocence '*is in reality not a presumption*', but '*merely a statement of the prosecution's burden of proof*',[122] a 'tactical rule' aimed at 'the proper *allocation*' of the burden of proof '*at the trial* in

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unreliability of a witness)… [T]here is no onus of proof on the accused… The accused has to do nothing more than to cause the court, when reaching its decision, to have a reasonable doubt concerning the guilt of the accused.' (Headnote translation at 81D-G).

116 2013 1 SACR 165 (KZD) para 14.

117 Schwikkard *Presumption of Innocence* 79.

118 De Villiers *Problematic Aspects of the Right to Bail under South African Law* 243-244 (my emphasis).

119 2012 2 SACR 492 (GNP) para 9.

120 *Ibid* para 31. John van der Berg, in Van der Berg *Bail* 23, has a similar conception of the presumption of innocence, where, in arguing that the presumption should apply also at the pre-trial or bail stage, he espouses the view that '"[p]re-trial treatment of the accused should proceed from the assumption that he is innocent and his basic rights are not to be disturbed or ignored on an unconstitutional assumption of guilt before it is proved by the State in a fair public trial before an ordinary court of the land"' – quoting F Snyckers 'Criminal Procedure' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1996) 27-3.

121 Schwikkard *Presumption of Innocence* 29-30, 35; Packer *The Limits of the Criminal Sanction* 161.

122 HB Rothblatt *Handbook of Evidence for Criminal Trials* (1965) 177, as endorsed in Van der Merwe (1997) *SACJ* 268 (my emphasis).

respect of issues raised',[123] it simply cannot be that the presumption of innocence may operate outside a criminal trial for instance in a bail application.

It is submitted that similar considerations apply in respect of the Constitutional Court's finding in *Sanderson v Attorney-General, Eastern Cape*, in underlining the societal dimension of a delay in proceeding with a criminal trial, that:[124]

> In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial. The profound difficulty with which we are confronted in this case is that an accused person - despite being presumptively innocent - is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system. In *Mills*, Lamer J explained that
>
> > 'As a practical matter… the impact of a public process on the accused may well be to jeopardize or impair the benefits of the presumption of innocence. While the presumption will continue to operate in the context of the process itself, it has little force in the broader social context. Indeed, many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process.'[125]

It is further submitted that the notion that the accused is to be treated as innocent during the pre-conviction stage of the criminal process, is how the presumption of innocence ought to be read where the Court in *Sanderson* spoke of the 'the tension between the presumption of innocence and the publicity of trial' which the right to a trial within a reasonable time seeks to mitigate, thereby rendering the criminal justice system more coherent and fair.[126] The same applies where the Court added that the right to a trial within a reasonable time 'acknowledges that the accused, although presumed innocent, is nevertheless "punished" - and in some cases, such as pre-trial incarceration, the "punishment" is severe. The response of the Constitution is a

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[123] Dlamini (1998) *SACJ* 425 (my emphasis).

[124] 1998 1 SACR 227 (CC) para 23.

[125] *R v Mills* (1986) 26 CCC (3d) 481 (SCC) para 196 (Westlaw). See also *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 52, where it was held, with reference to *Sanderson* and *Mills* supra:

> 'Despite being presumed innocent, the accused is subject to various forms of prejudice and penalty merely by virtue of being an accused, because many in the community pay little more than lip service to such presumption of innocence. "Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friend and colleagues."'

[126] 1998 1 SACR 227 (CC) para 24.

pragmatic one - the trial must be "within a reasonable time". It makes sense, then, that a substantively fair trial… would include a provision that minimised the non-trial related prejudice suffered by an accused.'[127] The same notion, moreover, applies where the Court went on to observe: 'Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the play-thing of the State or of society.'[128] It is submitted that these observations by Kriegler J in *Sanderson* relate more to what Nico Steytler terms the '*concern*' or '*objective*' of the presumption of innocence being that 'an accused should not be punished for an offence for which he or she has not been convicted.'[129] It is also important to stress that Kriegler J in *Sanderson* affirmed that the 'several incidents of a fair trial' guaranteed in paras (*a*) to (*j*) of section 25(3) of the interim Constitution, including the right to be presumed innocent in terms of para (*c*), all 'relate[d] *directly to the conduct of the trial itself*.'[130] The Court pertinently added that 'the *trial emphasis* in s 25(3) mark[ed] *a clear contrast* from 25(1) and (2) [of the interim Constitution]; the former covering the custodial situation, the latter covering the arrest situation.'[131] It is submitted that the same can be said for section 35(3) of the final Constitution and the specific instances of a fair trial as enumerated under such provision, as well as the separate enumeration of section 35(3) from sections 35(1) and (2) of the Constitution governing respectively the arrest situation and the custody situation.

It is submitted, then, that in contrast to the position in Canada, where the presumption of innocence under section 7 of the *Canadian Charter of Rights and Freedoms* is viewed as a substantive principle of fundamental justice and thus, as one court affirmed, 'applies at all stages of the criminal process and how it is to be applied varies [according to] the context',[132] the South African constitutional right to be presumed innocent applies only in the criminal trial context.[133]

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[127] *Ibid* para 24.
[128] *Ibid* para 36.
[129] Steytler *Constitutional Criminal Procedure* 133-134 (my emphasis).
[130] 1998 1 SACR 227 (CC) para 21 (my emphasis).
[131] *Ibid* para 21 (my emphasis).
[132] *R v Pewngam* (2008) 40 WCB (2d) 138 para 58 (Westlaw), with reference to *R v Pearson* (1992) 77 CCC (3d) 124 (SCC). In the more recent decision of *R v Nassar* (2012) ONCJ 788 para 14 (CanLII), the Ontario Court of Justice restated that the presumption of innocence under Canadian law means that 'an accused is held to be innocent throughout his passage through the criminal justice system until such time as he has been found guilty by a court of competent jurisdiction.'
[133] P Schwikkard 'Arrested, detained and accused persons' in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (RS 23 2017) 29-33-29-34; Schwikkard

While '[t]he South African case law shows that the presumption of innocence is used to describe two different phenomena: (1) a rule regulating the standard of proof; and (2) a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial', '*it is clear that it is only the former which has been given constitutional protection*.'[134]

PJ Schwikkard observes that a definition of the presumption of innocence as a rule placing the burden on the prosecution to prove the guilt of an accused person beyond a reasonable doubt accords with the approach taken in English law.[135]

In the United States of America, the application or ambit of the presumption of innocence is also limited to the trial phase of the criminal process, as notably affirmed in the United States Supreme Court decision of *Bell v Wolfish*.[136] The presumption is 'a doctrine that allocates the burden of proof in criminal trials', and may also serve as an admonishment to the trier of fact 'to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions

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'Evidence' in *CLOSA* 52-12-52-13; Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 755 (para 32.3(*a*)(ii)); PJ Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in P Roberts & J Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) 25 31: '[T]he scope of the right to be presumed innocent has been restricted to the criminal trial'. See also *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) paras 9, 11; *National Director of Public Prosecutions v Phillips and Others* 2001 2 SACR 542 (W) paras 41, 45, where the Court pointed out that the right to be presumed innocent enshrined in section 35(3)(*h*) of the Constitution operates in criminal proceedings where the accused's guilt or innocence is in issue, that is, in proceedings 'by which an accused person is tried and convicted for an offence' and 'which may culminate in the "punishment" of the accused person.'

[134] Schwikkard 'Arrested, detained and accused persons' in *South African Constitutional Law: The Bill of Rights* 29-33, with reference to *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 2 SACR 557 (CC) paras 50-51 (my emphasis).

[135] Schwikkard *Presumption of Innocence* 39 n 59, with reference to C Tapper *Cross and Tapper on Evidence* 12 ed (2010) 132, where it is noted as follows: 'When it is said that an accused person is presumed to be innocent, all that is generally meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt.' (Footnote omitted).

[136] 441 US 520 533 (1979). For a critique of this rule enunciated in *Bell's* decision, see D Jett 'The Loss of Innocence: Preventive Detention under the Bail Reform Act of 1984' (1985) 22 *American Criminal Law Review* 805; Kitai (2002) *Oklahoma Law Review* 257; Quintard-Morénas (2010) *The American Journal of Comparative Law* 107. It is submitted, however, that such criticism of *Bell v Wolfish* conflates the presumption of innocence with the notion that prior to conviction, a person who is the subject of a criminal investigation must be treated as legally innocent at all stages of the criminal process, in other words, he or she must not be treated as a criminal or punished as a convicted person, particularly vis-à-vis pre-trial detention, before being found guilty by a competent court, and should also not be regarded in the media as guilty prior to conviction. This notion is expressed thus in an American context in LH Tribe 'Trial by Mathematics: Precision and Ritual in the Legal Process' (1971) 84 *Harvard Law Review* 1329 1371: 'The presumption [of innocence] retains force not as a *factual* judgment, but as a *normative* one - as a judgment that society *ought* to *speak* of accused men as innocent, and *treat* them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed.' (Author's emphasis).

that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.'[137] This presumption is founded upon the American concept of jurisprudence which seeks above all to protect the innocent.[138] The state must prove beyond a reasonable doubt each and every element of the crime charged, and every fact and circumstance necessary for conviction.[139] Evidence must be produced to overcome the presumption that the accused is innocent.[140] The burden of proof as to the guilt of the accused is always on the state.[141] The burden of proof never shifts to the accused to prove his or her innocence.[142] Once the prosecution has presented a *prima facie* case, the accused may offer evidence in rebuttal, or he or she may offer no proof and rest on the presumption of innocence.[143] The presumption of innocence requires that all reasonable doubts be resolved in favour of the accused.[144] The presumption of innocence 'disappears' when a verdict of guilty, supported by substantial evidence, is returned against the accused.[145]

Broader construals of the presumption of innocence indicate that the presumption is more than just the doctrine that the prosecution must prove the guilt of an accused.[146] 'An alternative view is that the presumption of innocence is a wider concept encompassing a number of other safeguards.'[147] An expansive reading of the presumption of innocence holds for instance that the presumption is a 'broad over-arching principle' defining the relationship between the state and the individual throughout the criminal process and in terms whereof the suspect or accused is to be treated as innocent until found guilty in a court of law.[148]

A wide interpretation of the presumption of innocence sees the presumption as not a discrete sub-right or element of the right to a fair trial, but as a general,

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[137] *Bell v Wolfish* 441 US 520 533 (1979). See also Rothblatt *Handbook of Evidence for Criminal Trials* 177-178.
[138] Rothblatt *Handbook of Evidence for Criminal Trials* 178.
[139] *Ibid* 167.
[140] *Ibid* 167.
[141] *Ibid* 167.
[142] *Ibid* 168.
[143] *Ibid* 168.
[144] *Ibid* 178.
[145] *Ibid* 178.
[146] Summers (2001) *The Juridical Review* 54-57.
[147] *Ibid* 42.
[148] Jackson & Summers *The Internationalisation of Criminal Evidence* 205-207. See also, for example, Owusu-Bempah (2013) *The International Journal of Evidence & Proof* 196; Ferguson (2016) *Criminal Law Forum* 131, discussing *inter alia* the pre-trial application of the presumption.

integrated right to due process, a maxim which effectively summarises the procedural rights, or signifies the bundle of rights, that an accused should have: the presumption 'mandates that the state cannot convict someone of a crime unless and until the prosecution demonstrates her guilt in a process that bears the defining features, including rights and protections, of a fair trial.'[149]

This is the stance taken by Hock Lai Ho who posits a broad interpretation of the presumption of innocence. Ho argues that the presumption of innocence 'is fundamental in protecting our freedoms.'[150] According to Ho, the presumption of innocence as a human right 'consists of a complex of rights held against the state.'[151] The writer notes that 'an important corpus of those rights pertains to due process or, equivalently, a fair trial.'[152] 'But', says Ho, 'these rights do not exhaust the presumption of innocence; as a human right, its domain of operation is wider. The presumption is also the source of other rights against the state, rights that operate

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[149] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 266-267. According to Ho, such a broad conception of the presumption of innocence may be unconventional particularly among lawyers trained in the common law. (*Ibid* 266). However, Ho (*ibid* 266-267) finds historical support for such an understanding of the presumption in K Pennington 'Innocent until proven guilty: The Origins of a Legal Maxim' (2003) 63 *The Jurist* 106 124, where in tracing the origin of the presumption, it is observed that:

> 'The maxim, "innocent until proven guilty" was born in the late thirteenth century, preserved in the universal jurisprudence of the *Ius commune*, employed in the defense of marginalized defendants, Jews, heretics, and witches, in the early modern period, and finally deployed as a powerful argument against torture in the sixteenth, seventeenth, and eighteenth centuries. By this last route it entered the jurisprudence of the common law… But because it was a transplant from the *Ius commune*, it entered the world of American law in a very different form. It no longer was a maxim that signified the bundle of rights that was due to every defendant. Because American law did not inherit the jurisprudence of the *Ius commune* directly, its broader meanings were lost during the transplant. Consequently, the focus in America has been entirely on its meaning for the presenting of evidence and for procedural rules in the courtroom. In the jurisprudence of the *Ius commune*, the maxim summarized the procedural rights that every human being should have no matter what the person's status, religion, or citizenship. The maxim protected defendants from being coerced to give testimony and to incriminate themselves. It granted them the absolute right to be summoned, to have their case heard in an open court, to have legal counsel, to have their sentence pronounced publicly, and to present evidence in their defense. A jurist of the *Ius commune* would be puzzled that today we can embrace the maxim "a person is innocent until proven guilty" and still deny human beings a hearing under certain circumstances. For them the maxim meant "no one, absolutely no one, can be denied a trial under any circumstances." And that everyone, absolutely everyone, had the right to conduct a vigorous, thorough defense.'

(The *Ius commune* was the common law of Europe from the twelfth to the seventeenth centuries, formed by the fortuitous and contingent conjuncture of Roman law, canon law, and, later, feudal law in the schools and courts of medieval Europe. (*Ibid* 112). The Roman law, canon law, and the *Ius commune* were the sources that gave rise to the great Anglo-Saxon principle: 'A person is presumed innocent until proven guilty.' (*Ibid* 116).)

[150] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 261.

[151] *Ibid* 263.

[152] *Ibid* 263.

outside the confines of the courtroom.'[153] Ho maintains that the presumption of innocence 'is not only a rule that regulates the criminal trial. It also reaches beyond the trial and constrains the state in other ways.'[154] The presumption of innocence 'gives citizens the right to challenge the executive, to hold it to account before the court when it seeks to infringe their liberty. It offers assurance of security from arbitrary and unjust interference by the state.'[155] Ho opines that the presumption of innocence is 'a central pillar of the rule of law that puts protective distance between government and citizens.'[156] Ho suggests that '[u]nderlying the presumption of innocence is the demand for government accountability in its enforcement of the criminal law.'[157] In respect of the criminal trial, Ho believes that the presumption of innocence reflects a central purpose of the trial, being 'to hold the prosecution, as part of the executive arm of government, to account in its quest to enforce the criminal law.'[158] Ho remarks that '[a] court that respects the presumption of innocence sees its role as a check on government, and it is a distortion of this role to have the court stand in solidarity with the executive in a concerted "fight against crime".'[159] For Ho, '[t]he presumption of innocence coheres perfectly with the theory of the criminal court as a check on the executive at a critical stage of criminal law enforcement. The accused cannot be convicted unless the prosecutor can properly justify to the satisfaction of the court as an independent and unbiased tribunal, and in an open proceeding that grants the accused the right of participation, its claim that the accused is guilty as charged.'[160] If the criminal trial is to stay true to its function as a check on the executive, the presumption of innocence would require that the court cannot start the trial by believing the prosecution's allegations.[161]

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[153] *Ibid* 263.
[154] *Ibid* 264.
[155] *Ibid* 279, as endorsed in Owusu-Bempah (2013) *The International Journal of Evidence & Proof* 196: 'The presumption of innocence can protect the accused's autonomy and dignity; the presumption allows the accused to challenge the state and hold it to account before it can exert its powers of condemnation and punishment.' See too Owusu-Bempah *Penalising Defendant Non-Cooperation in the Criminal Process and the Implications for English Criminal Procedure* 98, noting that the presumption of innocence 'allows citizens to challenge the state and hold it to account before it can exert its powers of condemnation and punishment. It thus provides a strong reason against requiring the accused to participate in the criminal process or to assist the state in discharging its burden.'
[156] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 273.
[157] *Ibid* 277.
[158] *Ibid* 259.
[159] *Ibid* 278.
[160] *Ibid* 273.
[161] *Ibid* 273.

Ho underlines that, as a human right, the presumption of innocence means that the presumption can only be defeated when 'guilt is proved *in a manner that satisfies certain minimum requirements.*'[162] Implicit in the presumption of innocence therefore is that guilt must be proved '*in a particular fashion*', namely '*according to law*', which includes fundamental rules of natural justice.[163] The presumption is overcome only if guilt is established in a procedurally regular fashion. Ho thus clearly conflates the presumption of innocence with Herbert Packer's concept of 'legal guilt', which according to PJ Schwikkard has led to 'definitional ambiguity' as to the precise content of the presumption.[164]

Ho points out that the European Court of Human Rights, in interpreting the right to be presumed innocent enshrined in Article 6(2) of the European Convention on Human Rights ('ECHR'),[165] has equated the presumption of innocence with a range of fair trial rights and has treated it as an equivalent to the general principle of a fair trial.[166] Thus, as Andrew Stumer observes, the Strasbourg Court has held that the presumption of innocence requires that adverse inferences should not be drawn from silence unless the evidence calls for an explanation, 'that the court be independent and impartial', that the accused be informed of the charge, and that the accused be entitled to the privilege against self-incrimination.[167] But as Stumer argues, and in my view correctly so, the Strasbourg Court in conflating the presumption of innocence with these fair trial rights and equating the presumption with the general principle of a fair trial, 'has lost sight of the sense in which the presumption is a distinct principle requiring the prosecution to prove its case to a sufficient standard of certainty.'[168] Stumer argues further that by subsuming the right to be presumed innocent in terms of Article 6(2) of the ECHR under the overall right to a fair trial in terms of Article 6(1) of the ECHR, is contrary to the structure of the ECHR which places the presumption of innocence in a separate paragraph.[169] This subsumption also belies the drafting history of the ECHR which reveals a process in

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[162] *Ibid* 268 (author's emphasis).
[163] *Ibid* 268 (author's emphasis).
[164] Schwikkard *Presumption of Innocence* 30.
[165] 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'
[166] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 268.
[167] Stumer *The Presumption of Innocence* 95-96.
[168] *Ibid* 96.
[169] *Ibid* 96.

which the presumption was deliberately removed to its own paragraph. The drafting history shows that the presumption of innocence was not subsumed within or deemed to be constitutive of other fair trial rights.[170] Stumer maintains that '[t]he presumption of innocence stood alone as a separately defined guarantee with its own distinct content. In its case law on Article 6(2), the Strasbourg Court has given insufficient attention to the distinct nature of the presumption of innocence.'[171]

For present purposes it may be noted, as alluded to above, that a broad construction of the presumption of innocence conflates judicial impartiality with the presumption.[172] Sarah Summers points out that the European Court of Human Rights ('ECtHR') 'has noted the importance of the requirement of judicial impartiality to the presumption of innocence. The judge must begin with the presumption that the accused is innocent and the burden of advancing the necessary evidence lies on the prosecution.'[173] The conflation of, or correlation between, the presumption of innocence and judicial impartiality has been articulated as follows by the Court:[174]

> [Article 6(2) of the ECHR] embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.[175]

Stefan Trechsel indicates that 'a central element in the protection of the presumption of innocence lies in ensuring the impartiality of the judge. He or she "should not start with the conviction or the assumption that the accused committed the act with which

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[170] *Ibid* 96-98.

[171] *Ibid* 98.

[172] See, for example, Trechsel *Human Rights in Criminal Proceedings* 164-165, 174; Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 268, 276; Summers (2001) *The Juridical Review* 54-55; Stumer *The Presumption of Innocence* 96; P Leach *Taking a Case to the European Court of Human Rights* 3 ed (2011) 295-296; GP Fletcher 'The Presumption of Innocence in the Soviet Union' (1968) 15 *UCLA Law Review* 1203 1214, 1222; K Reid *A Practitioner's Guide to the European Convention on Human Rights* 2 ed (2004) 156 (para IIA-149); Steytler *Constitutional Criminal Procedure* 318.

[173] Summers (2001) *The Juridical Review* 55. See also Trechsel *Human Rights in Criminal Proceedings* 164-165; S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (1993) 49-50.

[174] *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360 para 77.

[175] See also *Austria v Italy* (1963) 6 Yearbook of ECHR 740 782, where a similar finding was made:

> 'This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged.'

See too *X v The Federal Republic of Germany* ECmHR (13-07-1970) application no. 4124/69; *Telfner v Austria* (2002) 34 EHRR 7 para 15; *Lavents v Latvia* ECHR (28-11-2002) application no. 58442/00 para 125.

he is charged".'[176] Trechsel notes, in describing the relationship between the right to be presumed innocent and other aspects of the right to a fair trial, that '[t]he presumption of innocence is, insofar as it requires that the judge maintain an open mind, closely linked to the right to an impartial tribunal.'[177] In this respect, Trechsel sees no justification for drawing a distinction between the protection afforded by the presumption of innocence under Article 6(2) of the ECHR and that of the overall or general right to a fair trial under Article 6(1) of the Convention,[178] which latter provision provides *inter alia* that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Hock Lai Ho similarly argues that '"[a]n independent and unbiased tribunal" is not a discrete fair trial standard to be placed alongside the presumption of innocence; it is itself an aspect of the presumption. Innocence is presumed by withholding any initial weight to the prosecutor's assertion that the accused has committed the alleged crime.'[179]

This facet of the presumption of innocence would fall under what Trechsel calls the 'outcome-related aspect' of the presumption (being the first of two fundamental distinct aspects of the presumption identified by the writer), which is closely linked to the outcome of the proceedings.[180] Trechsel elucidates this feature of the presumption of innocence, which indeed has wide parameters, as follows:[181]

> The right to be presumed innocent can be regarded as being connected to the psychological climate in which proceedings ought to unfold and it requires that the prosecutor and the judge adopt a particular attitude. Even though, deep down in their hearts, they may be convinced of the accused's guilt, they must remain open to a change of opinion in view of the result of the evidence. They are prohibited from doing or saying anything, before the judgment has been delivered, which implies that the defendant has already been convicted. The question as to the guilt or innocence of the accused, which is, after all, the essence of the proceedings, must remain open, even if the evidence against the accused appears to be overwhelming. Finally,

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[176] Trechsel *Human Rights in Criminal Proceedings* 174. At the time of writing, Trechsel was a Judge of the International Criminal Tribunal for the former Yugoslavia and Professor of Criminal Law and Procedure at the University of Zurich. He was also previously President of the European Commission of Human Rights.
[177] *Ibid* 164.
[178] *Ibid* 174.
[179] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 276.
[180] Trechsel *Human Rights in Criminal Proceedings* 163, 167-178.
[181] *Ibid* 163-164 (footnotes omitted).

> the accusation must be proved beyond reasonable doubt. The purpose of the guarantee is essentially to avoid unjustified convictions and to uphold the fairness of the trial. This aspect of the guarantee is addressed primarily to the decision-maker responsible for deciding whether the accused is guilty or not.[182]

A wide construal of the presumption of innocence also conflates the presumption with the effects of adverse pre-trial publicity.[183] The ECtHR has pointed out that adverse or prejudicial pre-trial publicity may violate the presumption of innocence under Article 6(2) of the ECHR.[184] In *Włoch v Poland*, the Court, in considering the issue of the impact of pre-trial publicity in the light of Article 6(2), conflated the question of the impartiality of the trial court with the presumption of innocence, holding that there were 'no grounds [*in casu*] on which to find that the impartiality of the court competent to deal with the applicant's case was adversely affected by the press campaign to a degree amounting to a breach of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.'[185] In the more recent decision of *Shuvalov v Estonia*, the Strasbourg Court expressly reaffirmed that 'a virulent press campaign can adversely affect the fairness of the trial', and that '[t]his is so with regard to the impartiality of the court under Article 6 § 1 as well as with regard to the presumption of innocence embodied in Article 6 § 2'.[186] Stefan Trechsel remarks that '[m]edia publicity can have particularly dangerous consequences for the

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[182] See Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* 49, where it is similarly noted that the presumption of innocence is *inter alia* a 'procedural guarantee':

> 'It imposes a duty on the members of the court to approach the case before them with a certain attitude. "Court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged". It is also crucial for the evidence-taking process. It places the burden of proving the accused's guilt on the prosecution and allows the accused the benefit of doubt.' (Footnotes omitted).

Stavros indicates that the presumption of innocence in terms of Article 6(2) of the ECHR protects the accused against a 'biased adjudicator'. (*Ibid* 50).

[183] See Summers (2001) *The Juridical Review* 55, 57, observing that the ECtHR has held that Article 6(2) of the ECHR 'provides that there ought to be consideration of the effect of any negative pre-trial publicity.' But in order to succeed, 'the applicant would have to demonstrate that the publicity had a detrimental effect on the trial which resulted in his conviction, and to show this causal link has proven extremely difficult.' (*Ibid* 55). See similarly, Loucaides (2003) *Human Rights Law Review* 39.

[184] See, for example, *Alkaşi v Turkey* ECHR (18-10-2016) application no. 21107/07 para 22; *Allen v The United Kingdom* ECHR (12-07-2013) application no. 25424/09 para 93; *Ensslin, Baader & Raspe v The Federal Republic of Germany* ECmHR (08-07-1978) application numbers 7572/76, 7586/76 and 7587/76, DR 14, 64 112-113; *Du Roy and Malaurie v France* ECHR (03-10-2000) application no. 34000/96 para 34; *GCP v Romania* ECHR (20-12-2011) application no. 20899/03 para 46.

See also DJ Harris, M O'Boyle, EP Bates & CM Buckley *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* 3 ed (2014) 466.

[185] ECHR (30-03-2000) application no. 27785/95 20.

[186] ECHR (29-05-2012) application numbers 39820/08 and 14942/09 para 82, citing *Ninn-Hansen v Denmark* (1999) 28 EHRR CD96 111; *Anguelov v Bulgaria* ECHR (14-12-2004) application no. 45963/99 15.

presumption of innocence. While it is certainly legitimate to inform the public about criminal proceedings, even sometimes during the preparatory stages, it is nevertheless essential that statements presenting the accused as guilty are avoided.'[187] Trechsel adds that '[i]t is essential that the judge makes it clear that he or she will not be influenced by a press campaign and gives a clear warning to jurors and other lay participants to that effect.'[188]

Sarah Summers comments, however, that the question of pre-trial publicity does not fall within the boundaries which have traditionally defined the presumption.[189] Summers opines, and in my view correctly so, that by extending the scope of the presumption of innocence to include events leading up to trial including the possibility that adverse media publicity affecting the outcome of the case may contravene the presumption, renders the doctrine of the presumption too wide.[190]

An expansive reading of the presumption of innocence moreover conflates the presumption with the reputation of the individual; the so-called 'reputation-related aspect' of the presumption. Trechsel identifies this facet as the second fundamental aspect of the presumption of innocence.[191] This aspect of the presumption is supported, for instance, by Hock Lai Ho, where he states that the presumption is not only a rule which regulates the criminal trial, but also reaches beyond the trial and constrains the State in other ways.[192] Trechsel points out that this aspect of the presumption of innocence 'is quite far removed from the issue of conviction/acquittal, but aims to protect the image of the person concerned as "innocent", i.e. not guilty of a specific offence. In other words, it protects the good reputation of the suspect.'[193] Trechsel explains that '[t]his means, for example, that a person who has not been convicted in criminal proceedings must not be treated or referred to by persons acting for the state as guilty of an offence.'[194] Trechsel notes that in many judgments of the ECtHR, in dealing with Article 6(2) of the ECHR, it has been held that the right to be presumed innocent '"will be violated if a statement of a public official

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[187] Trechsel *Human Rights in Criminal Proceedings* 177.
[188] *Ibid* 177.
[189] Summers (2001) *The Juridical Review* 55.
[190] *Ibid* 57.
[191] Trechsel *Human Rights in Criminal Proceedings* 164, and 178-191 for an analysis of the various instances where this aspect of the presumption of innocence features.
[192] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 264-265.
[193] Trechsel *Human Rights in Criminal Proceedings* 164.
[194] *Ibid* 164.

concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law"', and that '"it suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty".'[195]

Recent case-law of the ECtHR reiterates that the presumption of innocence in terms of Article 6(2) of the ECHR 'prohibits the premature expression by the tribunal of the opinion that the person "charged with a criminal offence" is guilty before he or she has been so proved according to law', and that '[i]t also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority'.[196]

So then, not only does the presumption of innocence under European law serve as a procedural guarantee at trial which *inter alia* protects the accused against

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[195] *Ibid* 164, quoting, for example, *Daktaras v Lithuania* ECHR (10-10-2000) application no. 42095/98 paras 41-42, where the ECtHR affirmed as follows:

> 'The Court recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial required by Article 6 § 1. It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty… In this regard the Court emphasises the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence. Moreover, the principle of the presumption of innocence may be infringed not only by a judge or court but also by other public authorities…, including prosecutors. This is particularly so where a prosecutor, as in the present case, performs a quasi-judicial function when ruling on the applicant's request to dismiss the charges at the stage of the pre-trial investigation, over which he has full procedural control'.

Trechsel also cites *Böhmer v Germany* ECHR (03-10-2002) application no. 37568/97 para 54, where the same Court similarly observed:

> 'The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty'.

[196] *Bauras v Lithuania* ECHR (31-10-2017) application no. 56795/13 para 50. See also *Kemal Coşkun v Turkey* ECHR (28-03-2017) application no. 45028/07 paras 41-42, where it was reaffirmed:

> '[T]he principle of presumption of innocence prohibits public officials from making premature statements about the defendant's guilt and acts as a procedural guarantee to ensure the fairness of the criminal trial itself. However, it is not limited to a procedural safeguard in criminal matters: its scope is broader and requires that no representative of the State should say that a person is guilty of an offence before his guilt has been established by a court…
>
> … The Court has previously held in this context that the presumption of innocence will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty… The scope of the protection… of [the] presumption of innocence therefore extends to all statements made by a public authority regardless of whether they have been pronounced in the confines of the criminal trial, in a different public setting or in other parallel judicial proceedings.'

'a biased adjudicator',[197] but its scope is broader, serving as a fundamental principle that protects everyone against being treated by public officials as guilty of an offence before this is established by a competent court in accordance with the law.[198] The presumption of innocence restrains a pronouncement of guilt, or a statement which suggests or implies guilt, without a proper hearing on the charges.[199] According to this understanding of the presumption of innocence, the presumption binds not only courts or judicial authorities, but prosecutors and other organs of state, including politicians and law enforcement agencies.[200] Any state official, for example, is precluded from making statements to the media which pronounce on the guilt of a suspect or accused, or which suggest or imply guilt, before a verdict of guilty is given by a competent court, that is, by a court involved in the determination of the criminal charges in a particular case.[201] In this regard, Stephanos Stavros,[202] under the rubric: '*Prejudicial Publicity Instigated by Public Authorities*', indicates that:[203]

> Prejudicial remarks made by state authorities in the pre-indictment phase regarding the guilt of the accused could also raise an issue under [the right to be presumed innocent in terms of Article 6(2) of the ECHR]. The following three principles emerge from the European Convention jurisprudence. First, a declaration by a public official that somebody is responsible for criminal acts before the competent court has reached such a conclusion amounts to an outright violation of Art. 6(2). Secondly, the authorities are not precluded from informing the public about criminal investigations and their progress by disclosing information about the existence of a suspicion, arrests and confessions, or about the dangerous character of the accused where uncontested information is available, as long as these statements do not amount to a formal declaration of the suspect's guilt. Care must be shown, however, in the formulation of such public statements to avoid, so far as possible, a misinterpretation by the public which could possibly lead to the suspect's innocence being called into question before trial. Thirdly, statements not admitting on their face of such a misinterpretation could

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[197] In *Allen v The United Kingdom* ECHR (12-07-2013) application no. 25424/09 para 93, the ECtHR affirmed that as a procedural guarantee in the context of a criminal trial itself, 'the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof…; legal presumptions of fact and law…; the privilege against self-incrimination…; pre-trial publicity…; and premature expressions, by the trial court or by other public officials, of a defendant's guilt'. See also *Austria v Italy* (1963) 6 Yearbook of ECHR 740 782-784.

[198] Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* 49-50.

[199] *Ibid* 49-50.

[200] *Ibid* 49-50; *Konstas v Greece* ECHR (24-05-2011) application no. 53466/07 para 32; Ferguson (2016) *Criminal Law Forum* 156; Leach *Taking a Case to the European Court of Human Rights* 297.

[201] Stavros supra 68-69; P Leanza & O Pridal *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights* (2014) 162 (§ 4.01).

[202] At the time of writing, Stavros was a member of the Athens Bar and employed as a legal expert by the Directorate of European Communities Affairs of the Greek Ministry of Foreign Affairs.

[203] Stavros supra 68-69 (footnotes omitted).

> fall foul of Art. 6(2), if they were calculated to, or resulted in, influencing judges and witnesses.[204]

In *Krause v Switzerland*, the European Commission of Human Rights[205] found that it is permissible for authorities to inform the public about 'criminal investigations', without offending the presumption of innocence.[206] The Commission held that the right to be presumed innocent is not violated if the authorities publicly 'state that a suspicion exists, that people have been arrested, that they have confessed etc.'[207] According to the Commission, '[w]hat is excluded, however, is a formal declaration that somebody is guilty.'[208] The Commission remarked that the application of the principle of the presumption of innocence is 'wider' than the 'procedural guarantee applying in any kind of criminal procedure';[209] the presumption also 'protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court.'[210] It was observed by the Commission that the presumption of innocence may, therefore, 'be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so.'[211]

In a similar vein, the ECtHR in *Allenet de Ribemont v France* pointed out that:[212]

> Freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6(2) cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.

In *Allenet de Ribemont's* case, some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. The

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[204] See also R Clayton & H Tomlinson *Fair Trial Rights* (2001) 115 (para 11.240); B Rainey, E Wicks & C Ovey *Jacobs, White and Ovey The European Convention on Human Rights* 7 ed (2017) 316-317.
[205] The Commission was the erstwhile, so-called filtering body which decided on the admissibility of applications to the European Court of Human Rights.
[206] ECmHR (03-10-1978) application no. 7986/77, DR 13, 73 76.
[207] *Ibid* 76. See also *Ensslin, Baader & Raspe v The Federal Republic of Germany* ECmHR (08-07-1978) application numbers 7572/76, 7586/76 and 7587/76, DR 14, 64 112-113, holding that the authorities are not precluded from making pre-trial statements, not about the guilt of the accused persons but about their dangerous character where uncontested information is available to them.
[208] *Krause v Switzerland* supra 76.
[209] *Ibid* 75.
[210] *Ibid* 75-76.
[211] *Ibid* 76.
[212] (1995) 20 EHRR 557 para 38.

statements in question were made in a press conference, together with the Interior Minister, while the case was under investigation. The Strasbourg Court found that the impugned remarks clearly constituted 'a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.'[213] According to the Court, there had therefore been a breach of Article 6(2).[214]

In *Lavents v Latvia*,[215] the ECtHR found that there was a clear violation of the presumption of innocence in the instance of a judge called upon to determine the charge, who declared to the press that she did not believe that the accused was innocent, stating that the most he could hope for would be a partial acquittal. In another interview she suggested that the accused should prove his innocence. The Court held that a judge assigned to a case must refrain from declaring publicly that the accused is guilty of the offence charged until his or her guilt has been duly established by the court.[216]

Thus, where the authorities publicly portray or describe a suspect or an accused as guilty before he or she has been tried and convicted, such is a clear infringement of the presumption of innocence under European Law.[217] This is to be

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[213] *Ibid* para 41.

[214] *Ibid* para 41. See similarly, *Borovský v Slovakia* ECHR (02-06-2009) application no. 24528/02.

See, however, *X v Austria* ECmHR (06-10-1981) application no. 9077/80, DR 26, 211 214-216; *RF and SF v Austria* ECmHR (07-10-1985) application no. 10847/84, DR 44, 238 244-245, for instances where pre-trial press statements issued by the police were found not to have violated the right to be presumed innocent, but could be characterised as merely having described a state of suspicion. For similar unobjectionable statements by a politician, see *Krause v Switzerland* ECmHR (03-10-1978) application no. 7986/77, DR 13, 73 75-76, and that of a prosecutor, see *Shuvalov v Estonia* ECHR (29-05-2012) application numbers 39820/08 and 14942/09 paras 75-84.

However, in *Butkevičius v Lithuania* ECHR (26-03-2002) application no. 48297/99 para 53, the Strasbourg Court regarded statements by the Chairman of the Lithuanian Parliament to the effect that 'he entertained no doubt that the applicant had accepted a bribe, that he had taken money "while promising criminal services", and that he was a "bribe-taker"', 'amounted to declarations by a public official of the applicant's guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority.' Accordingly, the Court found that there was a breach of Article 6(2) of the Convention. (*Ibid* para 54).

[215] ECHR (28-11-2002) application no. 58442/00.

[216] *Ibid* para 125. See also the observations relating to this case (which decision is in French) in Trechsel *Human Rights in Criminal Proceedings* 174-175; Leanza & Pridal *The Right to a Fair Trial* 162 (§ 4.01). See too Reid *A Practitioner's Guide to the European Convention on Human Rights* 156 (para IIA-149), noting further in respect of statements made by judges or courts during proceedings, that '[a] distinction is drawn between statements made reflecting the opinion that the person is guilty and statements which merely describe a "state of suspicion", the latter being unobjectionable prior to the final determination by the court.'

[217] See also Quintard-Morénas (2010) *The American Journal of Comparative Law* 138, 140-141, as to reforms brought about in French law, which now recognises the accused's right not to be publicly described as guilty before conviction, and thus, for example, a media report which leaves no doubt as to the culpability of the accused constitutes a violation of the presumption of innocence. See similarly,

distinguished from statements which merely describe the status of pending proceedings or a state of suspicion, which are regarded as unobjectionable.[218] Article 6(2) of the ECHR does not prevent the authorities from informing the public about criminal investigations in progress, but it does require them to be discreet and circumspect in order to preserve the presumption of innocence; any declaration or disclosing of the view, or suggestion made, that the suspect or accused is guilty before guilt is legally established is strictly prohibited – a statement disclosing the facts is permissible as long as it does not convey the impression that the suspect or accused is guilty.[219] In this context, the ECtHR has reiterated that 'there is a fundamental difference between saying that someone is merely suspected of having committed a criminal offence and unequivocally declaring, without any final conviction, that that person has committed the offence with which he has been charged'.[220] Stefan Trechsel remarks that cases dealing with the 'reputation-related aspect' of the presumption of innocence are more concerned with the opinion of the general public than with the attitude of the judge: after a public statement has been made which expressly or by implication presents a person charged with a criminal offence as guilty before he or she has been proved so according to law in a competent court, 'nobody will believe any more that the person is innocent.'[221] Trechsel notes therefore that in such instances there will be a violation of the presumption of innocence even if there is no subsequent trial.[222]

The ECtHR has also found that where a trial court in acquitting an accused, makes a statement in its judgment which suggests that the court nevertheless considers the accused guilty, this would be a violation of the presumption of innocence; such a statement would convey to the hearer or reader of the judgment that the accused was in fact guilty of the crime, whereas he or she had been acquitted. One such case is *Cleve v Germany*, where the ECtHR intimated that '[i]n

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PD Portier 'Media Reporting of Trials in France and in Ireland' (2006) 6 *Judicial Studies Institute Journal* 197 209-210; H Trouille 'A Look at French Criminal Procedure' (1994) *The Criminal Law Review* 735 740.

[218] *Sekanina v Austria* (1994) 17 EHRR 221 paras 39-40.

[219] Clayton & Tomlinson *Fair Trial Rights* 115 (para 11.240); Rainey, Wicks & Ovey *The European Convention on Human Rights* 316-317.

[220] *Dicle and Sadak v Turkey* ECHR (16-06-2015) application no. 48621/07 para 65. In this case it was held that where a court in a trial *de novo* refers to accused persons before judgment on the merits of the case as 'accused/convicted persons', such infringes the accused's right to be presumed innocent. (*Ibid* para 61).

[221] Trechsel *Human Rights in Criminal Proceedings* 164.

[222] *Ibid* 164.

cases in which a breach of the presumption of innocence by a judicial decision reflecting an opinion that an accused is guilty without him having been proved guilty according to law is at issue, the Court has held that a judicial decision may reflect that opinion even in the absence of any formal finding of guilt; it suffices that there is some reasoning suggesting that the court regards the accused as guilty'.[223]

What is more, Stefan Trechsel points out that once an acquittal has become final, the accused is protected 'from any official statement which insinuates that he or she is guilty, and from any such statement which says that he or she is still under suspicion, even if the reasoning of the judgment - whether it be public or secret - reflects doubts as to the accused's innocence.'[224] Another commentator likewise observes that the presumption of innocence subsists after the discontinuation of criminal proceedings, or following an acquittal; 'the presumption protects those who have been acquitted of a criminal charge from being treated by public officials and authorities as though they are in fact guilty.'[225] In *Cleve v Germany*, it was held in this respect:[226]

> [T]he presumption of innocence does not only apply in the context of pending criminal proceedings. It also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged… What is also at stake once the criminal proceedings have been concluded is the person's reputation and the way in which that person is perceived by the public…
>
> The Court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6 § 2 - the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence… The operative provisions of a judgment acquitting the accused must be respected by every authority which refers, directly or indirectly, to the criminal responsibility of the person concerned…[227]

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[223] ECHR (15-01-2015) application no. 48144/09 para 53.

[224] Trechsel *Human Rights in Criminal Proceedings* 182-183. See also, for instance, Rainey, Wicks & Ovey *The European Convention on Human Rights* 317; Reid *A Practitioner's Guide to the European Convention on Human Rights* 157-158 (paras IIA-150-IIA-151): '[C]omments made by judges on the termination [discontinuance] of [criminal] proceedings or following acquittal which reflect the opinion that the [accused] is guilty will violate the presumption of innocence'; Harris, O'Boyle, Bates & Buckley *Law of the European Convention on Human Rights* 464-465; Leach *Taking a Case to the European Court of Human Rights* 296.

[225] Ferguson (2016) *Criminal Law Forum* 156.

[226] ECHR (15-01-2015) application no. 48144/09 paras 35-36.

[227] See also *Rushiti v Austria* (2001) 33 EHRR 56 para 31:

> '[T]he general aim of the presumption of innocence… is to protect the accused against any judicial decision or other statements by State officials amounting to an assessment of the

5.2.1 Pronouncements of guilt in parallel judicial proceedings and the presumption of innocence

In the *Krion* pre-trial motion, the Applicant raised as a ground in the application for a stay of prosecution that adverse findings contained in earlier, related or parallel civil judgments, which directly or indirectly or by implication imputed criminal wrongdoing to the accused, violated the accused's right to be presumed innocent. This proposition would appear to resonate with case-law of the European Court of Human Rights, in terms of the very wide scope which the Court has attributed to the presumption of innocence. The ECtHR has held that 'the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.'[228]

> applicant's guilt without him having previously been proved guilty according to law. The Court cannot but affirm the general rule… that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The Court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6(2) - the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence.'

In *Sekanina v Austria* (1994) 17 EHRR 221, the accused was charged with the murder of his wife and detained on remand for just over a year. At his trial, the accused was acquitted by a jury. He applied for reimbursement of costs and compensation for his detention on remand from the State. The application was dismissed at first instance and on appeal on the basis that there was still considerable suspicion surrounding the accused's responsibility for the murder; in the courts' view the acquittal had not dissipated the suspicion of his having committed the murder. The accused thus alleged that in the compensation proceedings the Austrian courts had disregarded the presumption of innocence laid down in Article 6(2) of the Convention. The majority of the ECtHR found that the statements made by the national courts in the decisions to refuse the accused's compensation for unjustified detention were incompatible with the presumption of innocence. (*Ibid* paras 42-51). The majority Court held that 'like any other judicial decisions taken after an acquittal, those concerning compensation claims must not violate the presumption of innocence enshrined in Article 6(2). They are required to "presume" that the person concerned is "innocent" as he has not been "proved guilty according to law."' (*Ibid* para 46). See for example, in a similar vein, *Minelli v Switzerland* (1983) 5 EHRR 554; *Baars v Netherlands* (2004) 39 EHRR 25.

In *Y v Norway* ECHR (11-02-2003) application no. 56568/00, the accused, who had earlier been acquitted, was ordered to pay compensation to the deceased victim's parents; the decision was taken by the same court the day after the acquittal. In awarding compensation, it was expressly found by the domestic High Court that it was 'clearly probable that [the accused] ha[d] committed the offences'. (*Ibid* paras 13, 44). The ECtHR held that this finding violated the right to be presumed innocent under Article 6(2) of the ECHR, in that the impugned finding cast doubt on the correctness of the acquittal in the criminal proceedings and thus created a clear link between the criminal case and subsequent compensation proceedings; in other words, criminal liability was impermissibly imputed or attributed to the accused in the compensation proceedings. (*Ibid* paras 42-47).

[228] *Minelli v Switzerland* (1983) 5 EHRR 554 para 37. According to Steytler *Constitutional Criminal Procedure* 318, this means that the presumption of innocence in terms of Article 6(2) of the ECHR

The ECtHR has found that statements implying a person's guilt in the course of related judicial proceedings, whilst criminal proceedings are pending, may violate Article 6(2) of the ECHR.[229] The presumption of innocence 'may be infringed not only in the context of the criminal trial, but also in separate civil, disciplinary or other proceedings that are conducted simultaneously with the criminal proceedings.'[230] The presumption of innocence excludes a finding of guilt outside criminal proceedings in other 'parallel judicial proceedings', 'irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency'.[231] The presumption of innocence in terms of Article 6(2) thus imposes an obligation to respect the presumption on courts which are not involved in the determination of criminal charges in the particular case.[232] The ECtHR has observed that 'the duty to refrain from making prejudicial or premature comments regarding a person's guilt applies *a fortiori* to courts other than the one determining the criminal charge.'[233] This ties in with the principle under European law that 'the purpose of the right to be presumed innocent until proven guilty is not only to guarantee the fairness of the criminal trial from undue influences but also to protect a person's reputation from unjustified brandings of guilt';[234] the presumption of innocence serves mainly, as a procedural right, to guarantee the rights of the accused and it also 'helps to preserve the honour and dignity of the accused.'[235] The ECtHR has reiterated that the presumption of innocence will be violated if a 'judicial decision… concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty'.[236]

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requires that an accused's guilt should be based on evidence adduced in court through a process in which he or she can participate.

[229] Leach *Taking a Case to the European Court of Human Rights* 297.

[230] *Kemal Coşkun v Turkey* ECHR (28-03-2017) application no. 45028/07 para 41.

[231] *Ibid* para 42. See similarly, *Böhmer v Germany* ECHR (03-10-2002) application no. 37568/97 para 67. In Reid *A Practitioner's Guide to the European Convention on Human Rights* 156 (para IIA-149), it is noted in this regard: 'The presumption of innocence excludes a finding of guilt outside the criminal proceedings before the competent trial court and it is irrelevant to a finding of breach that procedural safeguards apply in parallel proceedings which prejudge the matters at trial.'

[232] Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* 49.

[233] *Kemal Coşkun v Turkey* ECHR (28-03-2017) application no. 45028/07 para 42.

[234] *Ibid* para 42. See also Trechsel *Human Rights in Criminal Proceedings* 164.

[235] *Konstas v Greece* ECHR (24-05-2011) application no. 53466/07 para 32.

[236] *Kemal Coşkun v Turkey* ECHR (28-03-2017) application no. 45028/07 para 42.

The ECtHR has moreover determined that the imposition of civil or other forms of liability on the basis of a less strict burden of proof in parallel judicial proceedings arising from the same facts as the criminal proceedings is not incompatible *per se* with the presumption of innocence.[237] The guarantees of Article 6(2) of the ECHR also do not imply that civil, disciplinary or other proceedings should be stayed pending the outcome of the criminal trial.[238] Article 6(2) safeguards first and foremost the way in which the accused is treated in the context of criminal proceedings by public authorities. It also places an obligation on judicial authorities in parallel or subsequent proceedings to stay within their respective fora and refrain from commenting on the person's criminal guilt when no such guilt has been established by the competent court. Thus, in the absence of a final criminal conviction, if the civil or disciplinary decision were to contain a statement imputing criminal liability to the applicant for the misconduct alleged against him in the civil or disciplinary proceedings, it would raise an issue under Article 6(2).[239] The Court has also underlined the importance of the choice of words by public authorities both in the context of the criminal trial and in parallel or subsequent proceedings. Where the criminal proceedings are pending and have not yet resulted with a final conviction or where they have ended with a result other than a conviction, any official statement that amounts to a pronouncement of the guilt of the accused or which calls into question the person's presumed or established innocence may fall foul of the presumption of innocence.[240] No authority may treat a person as guilty of a criminal offence unless he has been convicted by the competent court.[241] There is no justification for a court of law to make a premature pronouncement of this kind.[242]

The test is whether statements made in the course of civil proceedings can be said to have prejudged any future criminal proceedings.[243] Thus, statements which amount to a determination of guilt in civil proceedings may violate the presumption of innocence where they are sufficiently closely linked to criminal proceedings.[244]

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[237] *Ibid* para 52.
[238] *Ibid* para 52.
[239] *Ibid* para 52.
[240] *Ibid* para 52.
[241] *Ibid* para 54.
[242] *Ibid* para 56.
[243] *Blake v The United Kingdom* ECHR (25-10-2005) application no. 68890/01 para 124. See also the observations in Leach *Taking a Case to the European Court of Human Rights* 297, pertaining to this case.
[244] *Blake v The United Kingdom* ECHR (25-10-2005) application no. 68890/01 para 98.

In *Diamantides v Greece (No. 2)*,[245] while criminal proceedings were pending against the accused, the charges against him and the acts he was alleged to have committed were mentioned in a television programme. Considering himself to have been defamed, the accused lodged a defamation case. Most of the acts referred to in the statements he complained of constituted the offences for which he had been prosecuted. The domestic courts which dealt with the defamation proceedings instituted by the accused considered that the statements in issue were truthful and that there had been no defamation. They found against the accused in decisions which intimated that he had committed the offences. However, the accused had either been acquitted of the offences in question with final effect or the criminal proceedings concerning them were still in progress. The ECtHR found that in the defamation proceedings the accused had been *de facto* declared guilty of particular offences either before his guilt had been established by the criminal court responsible for examining all the relevant evidence, or despite the fact that he had been acquitted with final effect by the competent criminal court. The courts which had dealt with the defamation proceedings had used extremely vague and absolute terms that left no doubt that the applicant had indeed committed criminal offences, even though he had either already been acquitted of them or still faced charges. The Court unanimously held that there was accordingly a violation of the presumption of innocence.[246]

The ECtHR has, moreover, held that the presumption of innocence may be infringed by premature expressions of a suspect's guilt made within the scope of a judgment against separately prosecuted co-suspects.[247] Such judicial findings may have the same prejudicial effect on the proceedings pending against the suspect as a premature expression of a suspect's guilt made by any other public authority in close connection with pending criminal proceedings. The Court has recognised that in complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third persons, who may

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[245] ECHR (19-05-2005) application no. 71563/01.

[246] Information Note on the Court's case-law No. 75 – May 2005: '*Diamantides v. Greece (no. 2)* - 71563/01 Judgment 19.5.2005 [Section I]'. The judgment itself is only available in French. See also *Ismoilov and Others v Russia* ECHR (24-04-2008) application no. 2947/06; *Nešťák v Slovakia* ECHR (27-02-2007) application no. 65559/01; *Kaźmierczak v Poland* ECHR (10-03-2009) application no. 4317/04.

[247] *Karaman v Germany* ECHR (27-02-2014) application no. 17103/10 para 42. See also *Vulakh and Others v Russia* ECHR (10-01-2012) application no. 33468/03; Harris, O'Boyle, Bates & Buckley *Law of the European Convention on Human Rights* 465.

later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial. Criminal courts are bound to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third persons. However, if such facts have to be introduced, the court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it. In this context, it ought to be borne in mind that an accused being prosecuted separately, who is thus not a party to the proceedings against his or her co-accused, is indeed deprived of any possibility of contesting allegations made during those proceedings that he or she was involved in the crime.[248] The test in a case of this nature is whether inferences of guilt of a person are drawn from criminal proceedings in which he or she has not participated.[249] The question is whether the criminal court's reasoning is worded in such a way as to prejudge the suspect's guilt, who must still be tried, and thus to jeopardise the fair examination of the charges against him or her in separate proceedings.[250] The ECtHR will also examine whether the criminal court made sufficiently clear that it was not also implicitly determining the guilt of the suspect still to be tried in a separate case;[251] that it was not assessing such suspect's guilt but only assessing the criminal responsibility of those accused within the scope of the proceedings in issue.[252] It is sufficient if the court merely refers to or describes in its judgment the role played by the suspect in the criminal acts, but does not do more and assess or prejudge, or give the impression of prejudging, the suspect's guilt.[253]

It is submitted that the above expansive reading of the presumption of innocence under European law does not accord with the narrow meaning ascribed to the presumption in South African jurisprudence both in terms of the common law and constitutionally.[254] Moreover, the requirement that a person must be treated as innocent at all stages of the criminal process may be seen as following logically from

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[248] *Karaman v Germany* ECHR (27-02-2014) application no. 17103/10 paras 43, 64.
[249] *Ibid* para 65.
[250] *Ibid* paras 65, 70.
[251] *Ibid* para 67.
[252] *Ibid* para 69.
[253] *Ibid* para 66. See similarly, *Bauras v Lithuania* ECHR (31-10-2017) application no. 56795/13 paras 53-54.
[254] The meaning and scope of the presumption of innocence under South African law are dealt with more fully below.

the traditional meaning of the presumption, namely that the burden of proof is on the prosecution and it must establish the accused's guilt beyond a reasonable doubt.[255] It is not an aspect which defines the content of the presumption of innocence.

It is also relevant to note that the ECtHR, pertaining to the question of the presumption of innocence, factors into the consideration of the impact of pronouncements of guilt in parallel judicial proceedings on the fairness of subsequent criminal proceedings whether the legal effect of the earlier judgment is limited to the earlier proceedings. In other words, it considers the question whether the determination of the guilt or innocence of the accused in the later criminal proceedings would be based on a new assessment of all the evidence presented in the second proceedings and whether in the second proceedings the accused would have the opportunity of contesting the truthfulness of the contents of the evidence adduced against him or her.[256] The ECtHR determines whether the factual findings of a court in parallel or concurrent proceedings would have to be followed in the criminal proceedings against the accused (whether, in other words, the criminal trial court in which the affected party is an accused, would be bound by the earlier court's judgment) and whether the effect of evidence presented in the parallel proceedings is 'purely relative' and 'strictly limited to that particular set of proceedings'.[257] This approach under European law resonates with the finding in Ngoepe JP's judgment in the *Krion* pre-trial motion that a judge, as a trained judicial officer, knows that he or she must decide every case which comes before him or her on the evidence adduced in that case; that he or she also knows that a decision on facts in one case is irrelevant in respect of any other case, and that he or she must confine him- or herself to the evidence produced in the case he or she is actually trying.[258] Ngoepe JP held moreover that '[t]he trial judge would also be aware that the State *would still have to prove the facts required for the criminal conviction, despite the judgments in the civil matters*.'[259]

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[255] Schwikkard *Presumption of Innocence* 36.

[256] See *Bauras v Lithuania* ECHR (31-10-2017) application no. 56795/13 para 55.

[257] *Ibid* para 55. See also *Navalnyy and Ofitserov v Russia* ECHR (23-02-2016) application numbers 46632/13 and 28671/14 paras 105-107.

[258] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9. See also, for example, *S v Nienaber* 1976 2 SA 147 (NC) 150C-D on the principle of *res judicata*, and affirming that every case is to be decided on evidence adduced in that case before court.

For a general discussion on the principle of *res judicata* and the exception thereto, see *S v Molaudzi* 2015 2 SACR 341 (CC).

[259] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9 (my emphasis).

Moreover, it may be said that while human dignity is a foundational value of the South African Constitution,[260] which informs the interpretation of other fundamental rights,[261] including the right to be presumed innocent,[262] the presumption of innocence protects the dignity of an accused by imposing on the prosecution the burden of proving the accused's guilt beyond a reasonable doubt, thereby minimising the risk of an erroneous conviction or reducing to an acceptable level the risk of error in the court's overall assessment of evidence tendered in the course of the trial.[263] In *S v Manamela and Another (Director-General of Justice intervening)*, it was held in this respect: 'The presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the State proves an accused's guilt beyond a reasonable doubt, he or she cannot be convicted.'[264] In *S v T*, Plasket J appositely remarked that:[265]

> The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof - universally required in civilised systems of criminal justice - is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse - convictions based on suspicion or speculation - is the hallmark of a tyrannical system of law. South Africans have bitter experience of such a system and where it leads to.

Under South African law, therefore, the function of the right to be presumed innocent, which is an element or discrete sub-right of the right to a fair trial, and thus operative only in a criminal trial in which the guilt or innocence of an accused is in issue, is not to protect the reputation or good name of an accused. The right to a good name and reputation is encompassed or protected in the constitutional right to

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[260] See section 1 of the Constitution.
[261] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35. See also *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 144.
[262] *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 11; *S v Bogaards* 2013 1 SACR 1 (CC) para 51; *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 33.
[263] *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) paras 26, 40.
[264] *Ibid* para 40.
[265] 2005 2 SACR 318 (E) para 37 (footnotes omitted).

dignity.[266] The law of defamation consequently lies at the intersection of the right to freedom of speech and the right to human dignity.[267]

5.2.2 Critique of the wide scope ascribed to the presumption of innocence

Several commentators are critical of an expansive notion of the presumption of innocence. Patrick Healy[268] argues that a wide definition of the presumption of innocence results in the presumption assuming amorphic dimensions as a reason of policy or principle in rule-making and decision-making which is not restricted to trial; in other words, the presumption may be invoked as a reason for any decision or rule that seeks to control the jeopardy of the accused by minimising the risks of prejudice, unfairness, error or miscarriages of justice;[269] it may be invoked as a principle which underpins other procedural rights and protections. But so broad a notion of the presumption of innocence presents considerable ambiguity and effectively transforms the presumption 'into a vaporous euphemism for fairness in the administration of criminal justice', lacking in concrete substance that has practical utility or coherence.[270] Sarah Summers opines that an over-extension of the doctrine of the presumption of innocence will not only make it impossible for courts to enforce, but will also perpetuate the supposition that the presumption has no practical value.[271] Summers observes that the presumption of innocence is both asserted and applied in a number of different ways, and is as such relied upon as the principle behind other more tangible rules. But 'it would be *infinitely preferable* for the presumption of innocence to be contained within manageable boundaries. These limits would reflect the reasons for the origin of the doctrine, and would *reflect the affinity of the principle with both the burden of proof and the standard of that burden*.'[272]

Moreover, it may be said that rather than relying on an infringement of a 'general', amorphic right to be presumed innocent, one could conceivably, certainly

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[266] *National Media Ltd and Others v Bogoshi* 1998 4 SA 1196 (SCA) 1216I-1217B; *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 27.
[267] Currie & De Waal *The Bill of Rights Handbook* 256 (para 10.3).
[268] At the time of writing, Healy was of Wolfson College, Oxford.
[269] Healy (1987) *The Criminal Law Review* 364-365.
[270] *Ibid* 365. See also Stumer *The Presumption of Innocence* xxxix.
[271] Summers (2001) *The Juridical Review* 56.
[272] *Ibid* 56 (my emphasis). For a further critique, see Laudan (2005) *Legal Theory* 337-339.

in common-law jurisdictions, have recourse, in instances of adverse pre-trial publicity, to the crime of contempt of court where the media 'convicts' an accused before the court gives its verdict. An underlying rationale of this crime, as was seen in chapter two, is that if the said conduct by the media were not punishable, the media would be free to pronounce on the guilt of the accused, whereas the court may find him or her not guilty. The perception would then be created that the court's finding was wrong, whereas in fact it was correct.[273]

It should also be noted that the minority, dissenting judgment of Ngcobo J (as he then was) in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*, which suggests that the right to be presumed innocent means that an accused must be charged and tried before an impartial court before he or she can be pronounced guilty,[274] cannot be squared with the prevailing interpretation by the Constitutional Court of the presumption of innocence, in terms whereof the presumption is a rule requiring the prosecution to prove the guilt of an accused beyond a reasonable doubt.[275] It is also difficult, with respect, to reconcile the former Chief Justice's reading of the presumption of innocence with the scheme and structure of the Bill of Rights. Judicial impartiality is a constitutional imperative in terms of sections 34 and 165(2) of the South African Constitution, and a discrete unspecified element or component of the accused's right to a fair trial enshrined in section 35(3) of the Constitution.[276] It does not need the presumption of innocence, which is a separate, constitutive component of the right to a fair trial, for its enforcement or application.

The conflation of the right to be presumed innocent with other distinct procedural rights effectively equates the presumption with the concept of 'legal guilt', which means that an accused is to be treated as innocent unless guilt is established in a procedurally regular and fair fashion before a competent court. This conflation of the presumption of innocence with 'legal guilt' renders a definition of the presumption which is too wide and unwieldy, difficult to apply and gives rise to the risk of other constitutional rights being undermined.[277]

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[273] Snyman *Criminal Law* 321.
[274] 2008 2 SACR 421 (CC) para 374.
[275] See, for example, *S v Boesak* 2001 1 SACR 1 (CC) para 16. This aspect is amplified below.
[276] *S v Basson* 2007 1 SACR 566 (CC) paras 23-24, 26; *S v Jaipal* 2005 1 SACR 215 (CC) paras 30-31.
[277] Schwikkard *Presumption of Innocence* 29-39; Schwikkard (1998) *SACJ* 396-408.

5.2.3 Does European Court of Human Rights jurisprudence affirming a broad interpretation of the presumption of innocence apply in South Africa?

John van der Berg,[278] in his treatise on the law of bail in South Africa, suggests that jurisprudence of the European Court of Human Rights pertaining to the scope of the presumption of innocence, particularly in relation to its pre-trial application, should be taken into account when interpreting the presumption under South African law.[279] According to the writer, this is in line with section 39(1)(*b*) of the Constitution which requires a court in interpreting the Bill of Rights to consider international law.[280] Incorporating the European understanding of the presumption of innocence into South African law would fit in with Van der Berg's argument that the presumption should be 'extensively interpreted and applied so as to embrace all pre-trial procedures or proceedings that are capable of impacting on the fairness of the ultimate trial.'[281] Van der Berg disagrees with PJ Schwikkard's view that the right to be presumed innocent under South African law does not apply to proceedings outside the definition of a criminal trial.[282]

Besides the weight of authority by the Constitutional Court which suggests that the presumption of innocence does not in fact find application before or outside the criminal trial - an aspect dealt with shortly - it should be noted that the Constitutional Court has also cautioned that:[283]

> In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to South African legal system, history and circumstances, and *the structure and language of our own Constitution*. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

Perhaps more pertinent is the fact that when interpreting the Bill of Rights, having regard to the position in other jurisdictions does not displace the *purposive* approach to interpreting constitutional rights, as adopted by the Constitutional Court.[284]

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[278] At the time of writing, Van der Berg was an advocate of the High Court of South Africa and a member of the Cape Bar.
[279] Van der Berg *Bail* 22.
[280] *Ibid* 22.
[281] *Ibid* 21.
[282] *Ibid* 22.
[283] *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 39 (footnote omitted) (my emphasis).
[284] See *S v Williams and Others* 1995 2 SACR 251 (CC) paras 50-51.

In the Supreme Court of Canada decision of *R v Big M Drug Mart Ltd*, it was held in this respect:[285]

> The meaning of a right or freedom guaranteed by the Charter [*Canadian Charter of Rights and Freedoms*] was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, *in the light of the interests it was meant to protect*. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

This approach in interpreting constitutional rights has been endorsed by the Constitutional Court.[286] In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*, the Constitutional Court, affirming *R v Big M Drug Mart Ltd* supra, expressly observed that: '*This Court has reiterated that the Constitution must be interpreted purposively*.'[287] The Court, per Moseneke DCJ, appositely added that: 'In searching for the purpose, it is legitimate to seek to *identify the mischief sought to be remedied*.'[288] A purposive interpretation, then, 'tells us that once we have identified the purpose of a right in the Bill of Rights we will be able to determine the scope of the right.'[289] Moreover, a right is to be read in the context of the Bill of Rights and the Constitution as a whole; a determining factor being how the right fits into the *scheme* of the Bill of Rights and the Constitution.[290]

If, therefore, the purpose of the right to be presumed innocent 'is to minimise the risk that innocent persons may be convicted and imprisoned', which it does 'by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt',[291] and given the specified association of the presumption of innocence with the accused's right to a fair *trial* in the Constitution, and not outside the trial context in relation to other rights in the Bill of Rights, the very wide meaning ascribed to the presumption of innocence by the ECtHR would not apply or be apposite under South African law.

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[285] (1985) 18 CCC (3d) 385 paras 117-118 (Westlaw) (Court's and my emphasis).
[286] See, for example, *S v Zuma and Others* 1995 1 SACR 568 (CC) para 15; *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 9; Ackermann (2006) *SALJ* 502-503.
[287] 2007 6 SA 199 (CC) para 51 (my emphasis).
[288] *Ibid* para 53 (my emphasis).
[289] Currie & De Waal *The Bill of Rights Handbook* 137 (para 6.3(*b*)).
[290] Steytler *Constitutional Criminal Procedure* 8.
[291] *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 26.

5.3 The meaning, scope and function of the presumption of innocence under South African law

In South Africa, the presumption of innocence both in terms of the common law and as a constitutional right means that the burden is placed on the prosecution to prove the guilt of the accused beyond a reasonable doubt.[292] The common-law rule on the burden of proof is 'inherent' in the accused's constitutional right to be presumed innocent and forms part of the right to a fair trial.[293] 'The Constitutional Court has had ample opportunity to reiterate that the right to be presumed innocent requires

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[292] PJ Schwikkard 'A Constitutional Perspective on Statutory Presumptions' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 553 554 (para 29 2); CWH Lansdown, WG Hoal & AV Lansdown *Gardiner and Lansdown: South African Criminal Law and Procedure: Volume 1: General Principles and Procedure* 6 ed (1957) 459-460; *R v Benjamin* 1883 EDC 337 338; *R v Du Plessis* 1924 TPD 103 121-124; *R v Ndhlovu* 1945 AD 369 385-386; *S v Boesak* 2001 1 SACR 1 (CC) para 16. In Snyman (1975) *CILSA* 100, it is evident that the presumption of innocence and the onus of proof in a criminal trial resting throughout upon the prosecution were recognised as 'basic principles of justice' in our common law. South Africa adopted the English formulation, application and interpretation of the presumption of innocence – see Schwikkard *Presumption of Innocence* 7-9; De Villiers *Problematic Aspects of the Right to Bail under South African Law* 240; GE Devenish *A commentary on the South African bill of rights* (1999) 523 (stating that the constitutional right to be presumed innocent has its genesis in English common law, citing *Woolmington v The Director of Public Prosecutions* (1935) AC 462); *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) paras 9-10.

It is indicated, nonetheless, in Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in *Criminal Evidence and Human Rights* 31, that '[p]rior to 1995 the presumption of innocence had the same equivocal status in legal theory and practice as it enjoyed in the country from which it was inherited, as part of the legacy of English common law. That is to say, it was given high rhetorical regard but subjected to the vagaries of legislative will.' This was particularly so in respect of reverse onus provisions imposed on accused persons, in terms whereof the accused was required to disprove an element of a crime on a balance of probabilities, or to prove an exception, exemption, a proviso, excuse or a qualification, and consequently faced possible conviction despite raising reasonable doubt on the charge. Schwikkard notes, however, that since the advent of South Africa's new constitutional dispensation, 'the South African Constitutional Court has consistently struck down any deviation from the presumption of innocence's demand that the state prove each and every element of a crime beyond reasonable doubt.' (*Ibid* 31). In, for example, *S v Meaker* 1998 2 SACR 73 (W) 82*f*-83*a*, per Cameron J (as he then was), a summary is given of several *dicta* where statutory reverse onus provisions and presumptions succumbed to Constitutional Court determinations of invalidity, being in breach of the presumption of innocence and as such not held to be reasonable and justifiable in an open and democratic society. Reference is also made in *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 25 to such cases. Madala, Sachs and Yacoob JJ, for the majority Court, there reaffirmed that reverse onus provisions which impose a full legal burden of proof on an accused 'manifestly' transgress the presumption of innocence, for 'if after hearing all the evidence, the court is of two minds as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt.' (*Ibid* para 25). The Justices added that '[b]y virtue of the same logic, a conviction must follow if the court concludes that the accused's version, even though improbable, might reasonably be true.' (*Ibid* para 25). See also *S v Singo* 2002 2 SACR 160 (CC) paras 25-26. Moreover, in Paizes (1998) *SACJ* 409, it is argued that strict liability offences, that is statutory offences for which liability without fault suffices, also constitute a violation of the right to be presumed innocent which cannot, in the writer's view, be defended in the ordinary course.

[293] *S v Zuma and Others* 1995 1 SACR 568 (CC) para 33. See also *S v Lubaxa* 2001 2 SACR 703 (SCA) para 19, where it was observed that the presumption of innocence is a 'concomitant' of the burden of proof.

the prosecution to prove the guilt of an accused beyond reasonable doubt.'[294] In *S v Boesak*, for example, the Constitutional Court crisply held that 'what is required under our law by the presumption of innocence' is that 'the onus [is] on the State to prove the guilt of the accused beyond reasonable doubt.'[295] However, PJ Schwikkard argues that certain case-law by the Constitutional Court would seem to suggest that the presumption of innocence is restricted even further to merely a rule that guilt be proved to the required standard of beyond reasonable doubt, with the allocation of the burden of proof being seen as a requirement of the right to remain silent.[296]

The presumption of innocence applies to those elements of the State's case which must be established in order to justify conviction and punishment.[297] Schwikkard observes that the scope of the presumption of innocence as a

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[294] Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 755 (para 32.3(*a*)(ii)). See also Schwikkard 'Evidence' in *CLOSA* 52-12: *S v Zuma and Others* 1995 1 SACR 568 (CC) paras 25, 33; *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) para 15; *S v Mbatha; S v Prinsloo* 1996 1 SACR 371 (CC) paras 7-9 ('[T]he Constitution entrench[es] as a fundamental constitutional value the fact that it is the duty of the prosecution to prove the guilt of an accused person in a criminal case'); *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) para 7; *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 8; *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) para 13; *S v Mello and Another* 1999 2 SACR 255 (CC) para 4; *S v Baloyi* 2000 1 SACR 81 (CC) para 15; *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 26; *S v Singo* 2002 2 SACR 160 (CC) paras 25-26, 38.

[295] 2001 1 SACR 1 (CC) para 16. See similarly, *S v Thebus and Another* 2003 2 SACR 319 (CC) para 84:

> 'It is clear from our Constitution that the presumption of innocence implies that an accused person may only be convicted if it is established beyond a reasonable doubt that he or she is guilty of the offence. That, in turn, requires the proof of each element of the offence.'

[296] See Schwikkard 'Arrested, detained and accused persons' in *South African Constitutional Law: The Bill of Rights* 29-33, with reference to *S v Singo* 2002 2 SACR 160 (CC) ('The Constitutional Court has indicated that the presumption of innocence as a constitutional right is restricted to the requirement that guilt be proved beyond a reasonable doubt, while the allocation of the burden is a product of the right to remain silent'); PJ Schwikkard 'Presumption of innocence' (2000) 13 *South African Journal of Criminal Justice* 238 240, with reference to *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC):

> 'The court, by taking the view that the imposition of an evidentiary burden does not infringe the presumption of innocence, places a very restrictive interpretation on the presumption of innocence, in terms of which it would appear to determine no more than the standard of proof. This is difficult to reconcile with the Constitutional Court's definition of the presumption of innocence in prior cases in which the court has held that the presumption of innocence requires that *(a)* the state bears the burden of proving each of the essential elements charged, the accused bearing no onus to disprove them; and *(b)* that such proof must be beyond a reasonable doubt.'

[297] Schwikkard 'A Constitutional Perspective on Statutory Presumptions' in *Principles of Evidence* 554 (para 29 2). See also, for example, *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) para 15; *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) para 13; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 84; *Minister of Justice and Constitutional Development and another v Masingili and others* 2014 1 BCLR 101 (CC) para 57; Schwikkard *Presumption of Innocence* 40 *et seq*; Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 755 (para 32.3(*a*)(ii)).

constitutionally entrenched right in section 35(3)(*h*) of the South African Constitution, 'requiring the prosecution to prove guilt beyond a reasonable doubt at trial, is restricted to proof of those elements of the state's case that must be established in order to justify punishment.'[298]

The case-law clearly shows that the presumption of innocence 'will be infringed whenever there is the possibility of a conviction despite the existence of a reasonable doubt.'[299] Schwikkard writes that '[t]he *sole determinant* of constitutional compliance [with the presumption of innocence] *is whether there is the possibility of a conviction despite the existence of a reasonable doubt*.'[300] Wium de Villiers likewise notes that 'the effect of the presumption of innocence at trial *must be limited* to an understanding that the presumption is violated if conviction is possible despite the existence of reasonable doubt about guilt.'[301] If a provision 'relieves' the prosecution of its burden of proving all the elements of a crime, the presumption of innocence is infringed.[302] 'The arena in which the presumption of innocence has found greatest application is in that of reverse onus provisions.'[303]

It is clear in the circumstances, as was noted above, that the scope of the presumption innocence is limited to the criminal trial.[304] The presumption of innocence 'is a specified constitutional right that arises only in the context of an accused's right to a fair trial.'[305] 'It therefore does not apply to proceedings outside the definition of a criminal trial.'[306] The constitutional right to be presumed innocent

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[298] Schwikkard *Presumption of Innocence* 83-84.

[299] Schwikkard 'A Constitutional Perspective on Statutory Presumptions' in *Principles of Evidence* 554 (para 29 2 1). See also Schwikkard 'Evidence' in *CLOSA* 52-12; W de Villiers 'The Burden of Proof and the Weighing of Evidence in Criminal Cases Revisited' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 634 635, affirming that the presumption of innocence is 'violated in the context of a trial if conviction is possible despite the existence of reasonable doubt about guilt'. See too, for instance, *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) para 7; *S v Baloyi* 2000 1 SACR 81 (CC) para 15; *S v Singo* 2002 2 SACR 160 (CC) paras 29, 38-39.

[300] Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in *Criminal Evidence and Human Rights* 31 (my emphasis).

[301] De Villiers *Problematic Aspects of the Right to Bail under South African Law* 239 (my emphasis).

[302] Schwikkard (2000) *SACJ* 240. See also, for instance, *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) para 15.

[303] Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 755 (para 32.3(*a*)(ii)).

[304] *Ibid* 755 (para 32.3(*a*)(ii)); Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in *Criminal Evidence and Human Rights* 31; Schwikkard 'Evidence' in *CLOSA* 52-12-52-13; Schwikkard *Presumption of Innocence* 30-39; Schwikkard (1998) *SACJ* 397-408.

[305] Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 755 (para 32.3(*a*)(ii)). See also Schwikkard *Presumption of Innocence* 84.

[306] Schwikkard *Presumption of Innocence* 84.

is specifically and separately enumerated as an element of the right to a fair trial enshrined in section 35(3) of the Constitution, rendering it applicable only to an accused person in a criminal trial,[307] where the guilt or innocence of the accused is decided; where that is, 'the risk that an accused be convicted while there is doubt is to be neutralised.'[308] Writers who were members of the Technical Committee which drafted South Africa's transitional Bill of Rights point out that the right to be presumed innocent is a normative principle applying in criminal trials.[309]

The presumption of innocence pertains solely to the incidence and standard of proof at trial.[310] The presumption is narrowly formulated or defined.[311] The broader notion that the subject of an investigation must be treated as if he or she is innocent at all stages of the criminal process, follows logically from the doctrine of the presumption of innocence that guilt is dependent on the prosecution proving its case against the accused beyond a reasonable doubt.[312] Charles Dlamini argues that 'the presumption of innocence is a tactical rule aimed at the proper allocation of the *onus probandi* at the trial in respect of issues raised'.[313] Similarly, Nico Steytler observes that the presumption of innocence is limited to evidential and procedural issues; '[t]he presumption has no factual basis and merely establishes the process by which guilt is to be determined.'[314] Steph van der Merwe also notes in this respect that: 'Die grondwetlike vermoede van onskuld plaas die bewyslas op die staat.'[315] The presumption of innocence 'is not a presumption in the usual sense' but 'a general rule of policy' which requires that the prosecution should bear the onus on all issues.[316]

The right to be presumed innocent is to be regarded as having an 'exclusive identity' with distinct, independent content.[317] This is demonstrated, for instance, in the Constitutional Court decisions of *S v Manamela and Another (Director-General of*

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[307] See *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) paras 9, 11; *S v Baloyi* 2000 1 SACR 81 (CC) para 23; *National Director of Public Prosecutions v Phillips and Others* 2001 2 SACR 542 (W) paras 41, 45.

[308] See De Villiers *Problematic Aspects of the Right to Bail under South African Law* 237-244. See also Steytler *Constitutional Criminal Procedure* 321.

[309] See Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* 176-177.

[310] Schwikkard *Presumption of Innocence* 35-36; Schwikkard (1998) *SACJ* 403.

[311] Schwikkard *Presumption of Innocence* 29-39; Schwikkard (1998) *SACJ* 396-408.

[312] Schwikkard *Presumption of Innocence* 36; Schwikkard (1998) *SACJ* 403.

[313] Dlamini (1998) *SACJ* 425 (footnote omitted).

[314] Steytler *Constitutional Criminal Procedure* 321.

[315] Van der Merwe (1997) *SACJ* 268.

[316] D Zeffertt *LH Hoffmann and D Zeffertt's The South African Law of Evidence* 4 ed (1988) 513.

[317] Schwikkard *Presumption of Innocence* 38; Schwikkard (1998) *SACJ* 405.

Justice intervening)[318] and *S v Singo*,[319] in distinguishing between the right to be presumed innocent and the right to remain silent. PJ Schwikkard points out that '[t]he danger of conflating the presumption of innocence and other separately enumerated rights, is that those rights become vulnerable to the argument that in situations where the presumption of innocence is not applicable, or where the burden imposed by the presumption of innocence has been discharged, then those rights no longer apply.'[320] If the presumption of innocence is used to justify other constitutional or procedural protections in the criminal process, this would suggest that such latter protections may be squeezed out or balanced away once we have evidence of a person's guilt.[321] Thus, for example, the constitutional right to bail could be denied if evidence is presented that tends to prove the guilt of the accused, whereas a bail application is not concerned with the weighing of facts for a determination of guilt or innocence but with speculating on future conduct on the basis of information laid before court,[322] that is, it is concerned more with the question of whether the accused will stand trial if released on bail or whether there is a likelihood that the accused whilst out on bail may commit another offence or interfere with State witnesses.[323] The same could be said for the right to remain silent if it is held that an adverse inference can be drawn from an accused remaining silent after the State has presented a *prima facie* case that proves the guilt of the accused.[324]

Schwikkard notes further that the structure of section 35 of the Constitution supports the argument that the presumption of innocence should not be conflated with other rights or with the 'cluster of rights' associated with it.[325] Section 35(3) sets out as prerequisites for a fair trial a number of separately enumerated rights, which include the presumption of innocence, the right to remain silent, the privilege against self-incrimination and the right to legal representation. There would be no need to enumerate these rights separately if they were merely components of the

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[318] 2000 1 SACR 414 (CC).
[319] 2002 2 SACR 160 (CC).
[320] See Schwikkard *Presumption of Innocence* 37-38; Schwikkard (1998) *SACJ* 404-405.
[321] Jackson & Summers *The Internationalisation of Criminal Evidence* 207.
[322] Schwikkard *Presumption of Innocence* 35, with reference to *S v Mbele and Another* 1996 1 SACR 212 (W) 220*i*. See also, for instance, *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) para 78.
[323] See, for example, *Attorney-General, Zimbabwe v Phiri* 1988 2 SA 696 (ZH) 700A-B.
[324] See Schwikkard *Presumption of Innocence* 37-38; Schwikkard (1998) *SACJ* 404-405.
[325] Schwikkard *Presumption of Innocence* 38; Schwikkard (1998) *SACJ* 405.

presumption of innocence.[326] In *S v Dzukuda and Others; S v Tshilo*, the Constitutional Court made clear that elements of the accused's constitutional right to a fair trial, as specified in paras (*a*) to (*o*) of section 35(3) of the Constitution, are '*discrete* sub-rights' of the right to a fair trial.[327]

Schwikkard argues, moreover, that the normative value of the presumption of innocence as a rule regulating the incidence and standard of proof at trial may be diminished if we do not view the presumption has having 'exclusive identity', distinct from other rights.[328] Separate rights have different rationales (although there may be some overlapping). Thus, different policy considerations apply in determining when a limitation of any one right is justifiable.[329] Schwikkard notes that '[t]he normative value of a rule is undermined by the frequency of its breach. Consequently, we also need to distinguish between the presumption of innocence as a rule regulating the burden of proof and as a policy directive as to how persons should be treated prior to conviction. For example, whilst the breach of the presumption of innocence as the foundation of a policy directive might be frequently justified in denying bail applications, this should not be allowed to undermine the normative value of the presumption of innocence as a rule regulating the burden of proof.'[330]

The level of justification needed for a limitation of a right varies according to the interests at stake and the necessity of the action.[331] A stronger justification would be required to limit the right to be presumed innocent as a procedural protection at trial, than the breach of the presumption of innocence as a general policy directive that persons are to be treated as innocent at all stages of the criminal process until properly convicted by a competent court.[332] This is by reason of the fact that the conviction and punishment of an innocent person carries greater opprobrium or harm than other coercive actions by the State such as arrest, detention and search and seizure.[333]

Schwikkard maintains that conflating the presumption of innocence with other rights and failing to distinguish between the presumption as a rule regulating the

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[326] *Ibid*.
[327] 2000 2 SACR 443 (CC) para 9 (my emphasis).
[328] Schwikkard *Presumption of Innocence* 38-39; Schwikkard (1998) *SACJ* 405-406.
[329] *Ibid*.
[330] *Ibid* (footnote omitted). See similarly, Summers (2001) *The Juridical Review* 56.
[331] Jackson & Summers *The Internationalisation of Criminal Evidence* 207.
[332] *Ibid* 207.
[333] *Ibid* 207.

onus of proof and as a general policy consideration, would render 'an extremely unwieldly definition' of the presumption.[334] Schwikkard argues that '[s]uch a definition would result in difficulties of application as well as running the risk of undermining associated rights.'[335] Schwikkard concludes therefore that a definition of the presumption of innocence as a rule placing the burden on the prosecution to prove the guilt of an accused person beyond reasonable doubt, is to be preferred.[336]

In the circumstances, it may be said that unlike the position under European law, the presumption of innocence in our law should not be conflated with reputational concerns or interests of the suspect or accused applicable outside the trial context. Nor should it be conflated with the right to judicial impartiality, which is a discrete fair trial right[337] - separate from the right to be presumed innocent - and which requires *inter alia* that the presiding officer should not entertain a mental inclination or predisposition towards the guilt of an accused, that is, he or she should not carry or start with a preconceived notion of the guilt of the accused or simply put, should not presume or prejudge the guilt of the accused, which is plainly indicative of bias.[338] It is trite law that in the context of a criminal trial, the word 'bias' connotes some form of determination, or in the least a mental reservation, inclination or predisposition.[339] The Supreme Court of Appeal has affirmed that 'bias describes "a leaning, inclination, bent or *predisposition towards* one side or another or a particular result. In its application to legal proceedings, *it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction*."'[340] Bias entails 'a state of mind that is in some way *predisposed to a particular result*, or that is closed with regard to particular issues.'[341] The words

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[334] Schwikkard *Presumption of Innocence* 39; Schwikkard (1998) *SACJ* 406.
[335] *Ibid*.
[336] *Ibid*.
[337] Although not expressly included as a right under section 35(3) of the Constitution, the constitutional imperative of judicial impartiality (see sections 34 and 165(2) of the Constitution) 'is also closely linked to the right of an accused person to a fair trial' – *S v Basson* 2007 1 SACR 566 (CC) paras 23-26 (this aspect is dealt with more fully in chapter six). See too *S v Jaipal* 2005 1 SACR 215 (CC) paras 30-31; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21.
[338] See, for example, *S v Le Grange and Others* 2009 1 SACR 125 (SCA) paras 21-23; *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-1331B.
[339] See, for instance, *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-1331B; Posner (1999) *Stanford Law Review* 1514-1515.
[340] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21, citing with approval *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 106 (Westlaw) on the character of judicial bias (my emphasis).
[341] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 105 (Westlaw) (my emphasis).

'bias' and 'prejudice' are interchangeable terms[342] that include in their definitions a '*preconceived*' idea or notion, judgment or opinion, which interferes with impartiality.[343] *Black's Law Dictionary* defines 'bias' as:[344]

> Inclination; bent; prepossession; *a preconceived opinion*; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.

Similarly, *Merriam-Webster's Collegiate Dictionary* defines 'prejudice' *inter alia* as: 'preconceived judgment or opinion… an adverse opinion or leaning formed without just grounds or before sufficient knowledge'.[345]

Judicial bias refers *inter alia* to a 'prejudgment of the legal issues or the merits.'[346] To prejudge issues constitutes prejudicial bias, the reason for which is plain enough: once the trier of fact has prejudged a matter, he or she will perceive trial evidence differently.[347] It's been seen the dangers of early hypothesis formation by the trier of fact and related confirmation bias at trial. Prejudgment is illegitimate 'because judges who lack the information needed to make reasoned determinations on the merits must ground their decisions in under-informed speculation that is prejudiced (and hence, partial) by definition.'[348] Disqualifying bias is that which stems from an extra-judicial source and results 'in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'[349]

Impartiality, on the other hand, denotes 'that quality of *open-minded readiness to persuasion* - without unfitting adherence to either party or to *the Judge's own predilections, preconceptions and personal views*… Impartiality requires, in short, "*a*

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[342] See the definition of 'bias' in DA Dukelow & B Nuse *The Dictionary of Canadian Law* (1991).
[343] See, for example, DC Nugent 'Judicial Bias' (1994) 42 *Cleveland State Law Review* 1 2 nn 4 and 5, for dictionary definitions of 'bias' and 'prejudice' (my emphasis).
[344] *Black's Law Dictionary* 5 ed (1979) (my emphasis).
[345] *Merriam-Webster's Collegiate Dictionary* 11 ed (2011). In *Collins English Dictionary: Complete and Unabridged* 6 ed (2003), 'prejudice' is defined *inter alia* as: 'an opinion formed beforehand, esp an unfavourable one based on inadequate facts'.
[346] SE Bloom 'Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges' (1985) 35 *Case Western Reserve Law Review* 662 668. See also *De Lille and Another v Speaker of the National Assembly* 1998 7 BCLR 916 (C) para 17; SP Williams Jr 'Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom' (2018) 6 *Indiana Journal of Law and Social Equality* 48 60-61.
[347] M Tarkington 'Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity' (2014) 66 *Florida Law Review* 1873 1918.
[348] CG Geyh 'The Dimensions of Judicial Impartiality' (2013) 65 *Florida Law Review* 493 521.
[349] *United States v Grinnell Corp.* 384 US 563 583 (1966).

mind open to persuasion by the evidence and the submissions of counsel"'.[350] In terms of the presumption of judicial impartiality and the oath of office which is taken by judicial officers to administer justice without fear, favour or prejudice, it 'must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.'[351]

Thus, MT Mokoena's assertion, albeit in the context of bail, that '[t]he presumption of innocence, in ordinary criminal proceedings, demands that the presiding officer should, as a rule, empty his or her mind of any prejudices, preconceptions and biases which he or she might harbour regarding the applicant and/or the merits of the matter',[352] cannot be supported. It is the constitutional imperative of judicial impartiality that would require such.

Conflating the presumption of innocence with judicial impartiality may conceivably mean that if the State has discharged its burden of proof imposed by the presumption, impartiality by the presiding officer would no longer be required in the adjudication of the case, whereas impartial decision-making effectively means postponing the formation of an opinion or suspending judgment until all the evidence has been presented by both parties.[353] This simply demonstrates the fallacy of conflating the right to be presumed innocent with the right to an impartial court.

It is further submitted that the presumption of innocence under South African law is not as Hock Lai Ho puts it, a 'general right to due process' or a fair trial, according to which, as the writer claims, it is not as a human right a discrete standard of a fair trial, conceptually separate from all other standards of a fair trial and 'is not merely one of many other qualities that a trial must have to be considered fair', but 'mandates that the state cannot convict someone of a crime unless and until the prosecution demonstrates her guilt in a process that bears the defining features, including rights and protections, of a fair trial.'[354] The presumption of innocence in

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[350] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13 (my emphasis). See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48.

[351] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48. See also *Bernert v ABSA Bank Ltd* 2011 3 SA 92 (CC) para 32.

[352] Mokoena *A Guide to Bail Applications* 38-39. At the time of writing, Mokoena was a senior lecturer in Criminal Procedure at Unisa.

[353] See Zupančič (1982) *Journal of Contemporary Law* 82-85. See also Zupančič (2003) *European Journal of Law Reform* 95 n 162.

[354] Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 266.

our law is but a discrete sub-right of the constitutional right to a fair trial; it is an element of a fair trial, not a general or comprehensive and integrated right to a fair trial encompassing all other specified and unspecified, constitutive components thereof.[355] PJ Schwikkard, with reference to *S v Zuma and Others*,[356] speaks of 'the inter-relationship between the presumption of innocence and other rights necessary to *uphold* the right to a fair trial.'[357]

The true function of the presumption of innocence was held by the Constitutional Court in *S v Mbatha; S v Prinsloo* to be that of entrenching 'as a fundamental constitutional value the fact that it is the duty of the prosecution to prove the guilt of an accused person in a criminal case.'[358] In *S v Strauss*, Hattingh J pointed out that the presumption of innocence is, in popular terms, a manner of expressing the fact that the State bears the primary and final onus of establishing the guilt of an accused beyond reasonable doubt.[359] It was observed further that the presumption of innocence is a general policy rule which entails that the prosecution carries the onus of proving all the elements of the crime.[360]. The presumption of innocence 'has the effect of keeping the burden of proof upon the prosecution, and of preserving the degree of persuasion such proof must carry before there will be a conviction'.[361] The burden of proof is thus constitutionally allocated by the presumption of innocence.

Charles Dlamini writes that there are various ingredients of the accused's right to a fair trial as contained in the Bill of Rights, and that some of these are enumerated in the Bill of Rights while others are deemed to be part of it by virtue of the common law.[362] According to the author, one such ingredient not expressly mentioned 'is that the accused is entitled to have the case against him or her proved

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[355] See *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) paras 9, 11. See also *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 9, affirming a clear distinction between the right to be presumed innocent and the cluster of rights associated with it, as well as the '*general*' right to a fair trial. (My emphasis).

[356] 1995 1 SACR 568 (CC) para 33.

[357] Schwikkard *Presumption of Innocence* 31; Schwikkard (1998) *SACJ* 399 (my emphasis).

[358] 1996 1 SACR 371 (CC) para 7.

[359] 1995 5 BCLR 623 (O) 628D.

[360] *Ibid* 629H.

[361] A Steenkamp & R Nugent 'Arrested, Detained and Accused Persons' in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2002) 627 682. See also De Villiers (2003) *THRHR* 635:

> 'At trial the presumption creates a procedural and evidentiary rule that the prosecution must prove the guilt of the accused beyond reasonable doubt. Proof on a mere preponderance of probabilities is not enough.'

[362] Dlamini (1998) *SACJ* 423.

beyond a reasonable doubt.'[363] It is submitted, nonetheless, that the standard of proof would be constitutionally entrenched, and thus find expression, in the presumption of innocence, which is specified in the Constitution as a sub-right of the right to a fair trial. The reasonable doubt standard is, after all, 'the operational form of the presumption of innocence.'[364] Indeed, the reasonable doubt standard 'provides concrete substance for the presumption of innocence'.[365] There is moreover a correlation between the rationale for the presumption of innocence and that of the reasonable doubt standard;[366] both the presumption and the reasonable doubt standard have as their fundamental aim reducing the possibility of erroneously convicting an innocent accused.[367] James Morton and Scott Hutchison observe that although the considerations of sensible procedure and basic fairness mandate that the State must prove each element of an offence, 'it is the fear of erroneous convictions that leads to the reasonable doubt standard. It is by the rationale of preventing erroneous convictions that we must judge any purported definition of the presumption of innocence.'[368] The rationale for the presumption of innocence may thus be said to find expression in the reasonable doubt standard.[369] Furthermore, Sarah Summers points out that '[t]he debate surrounding the level of proof required to satisfy the Court that the prosecution had discharged their burden may have been relevant to the creation of the presumption of innocence.'[370] With reference to CK Allen,[371] Summers indicates that the germ of the presumption of innocence in England may have lain in the developing doctrine that the accused's guilt was manifest only when it was established beyond reasonable doubt.[372]

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[363] *Ibid* 423-424.
[364] Sheldrick (1986) *University of Toronto Faculty of Law Review* 180.
[365] *In re Winship* 397 US 358 363 (1970). See also *Lego v Twomey* 404 US 477 486-487 (1972). In *S v Chogugudza* 1996 3 BCLR 427 (ZS) 430D, it was held that the presumption of innocence 'finds expression in' the fundamental rule regulating the incidence and standard of the burden of proof.
[366] Schwikkard *Presumption of Innocence* 16.
[367] *Ibid* 16; Sheldrick (1986) *University of Toronto Faculty of Law Review* 180; Morton & Hutchison *The Presumption of Innocence* 5 ('By holding the prosecutor to a high standard of proof the presumption of innocence attempts not to eliminate mistakes, for that would be impossible, but to eliminate mistaken convictions'); Hamer (2011) *Oxford Journal of Legal Studies* 420; *In re Winship* 397 US 358 363-364, 372 (1970); *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 26; *S v Baloyi* 2000 1 SACR 81 (CC) para 15.
[368] Morton & Hutchison *The Presumption of Innocence* 6.
[369] Schwikkard *Presumption of Innocence* 16. See also Wilson (1981) *Hastings Constitutional Law Quarterly* 732-733.
[370] Summers (2001) *The Juridical Review* 50.
[371] Allen *Legal Duties*.
[372] Summers (2001) *The Juridical Review* 50.

In *S v Manamela and Another (Director-General of Justice intervening)*, it was noted that the central underlying purpose of the presumption of innocence 'is to minimise the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial.'[373] The objective of the presumption of innocence is to reduce 'the possibility of an erroneous conviction in pursuit of the ideal that only the blameworthy should be punished. If the location of the burden of proof as a component of the presumption of innocence is ignored the possibility of error increases.'[374] A definition of the presumption of innocence as a rule placing the burden on the prosecution to prove the guilt of an accused person beyond a reasonable doubt, 'provides an adequate means' for expressing this rationale of the presumption.[375] PJ Schwikkard comments that '[t]he presumption of innocence formulated as the fundamental principle that the prosecution bear the burden of proving guilt beyond a reasonable doubt serves to keep the frequency of erroneous convictions within tolerable parameters.'[376]

Ultimately, the '*nub*' of the protection provided by the presumption of innocence 'is to ensure that people are not convicted of an offence where a reasonable doubt exists as to their guilt. Guilt is only established when it is clear that the accused has no defence and that all the elements of the particular crime have been established. If an accused person can be convicted despite the existence of a reasonable doubt either in relation to one of the elements of the offence or one of the elements of a defence and a court is compelled to convict because of a reverse *onus* provision, the presumption of innocence is breached.'[377]

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[373] 2000 1 SACR 414 (CC) para 26 (footnote omitted).
[374] Schwikkard (2000) *SACJ* 240.
[375] Schwikkard (1998) *SACJ* 406-407.
[376] *Ibid* 408. Moreover, in De Villiers (2003) *THRHR* 635, it is pointed out that: '[T]he complex and expensive system of police and prosecutors provides the state with a powerful advantage against an accused. If innocence is not presumed, an elementary sense of fairness would require that the system be radically revised to provide the accused with an equivalent fact finding capability. Before tampering with the presumption of innocence, the whole pattern of evidential rules would have to be changed. A trial is not a relentless search for the truth. A risk is taken to set free some who are guilty, for fear of convicting the innocent.' Since the prosecution has all the resources of the State, including finances, the police and vital information at its disposal, it is required to present or disclose all material necessary for the investigation of the truth at trial – see Steytler *The Undefended Accused on Trial* 136. See similarly, in the latter respect, Schwikkard *Presumption of Innocence* 14.
[377] *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 189 (my emphasis).

It is, then, by the rationale of minimising the risk of an innocent person being convicted that we can define the presumption of innocence as a rule determining the incidence and standard of proof in a criminal trial.

In light of the above definition, scope, function, and rationale of the presumption of innocence and the sole instance of its violation at trial under South African law, it is submitted that adverse pre-trial publicity, or pronouncements of guilt in earlier related civil judgments, would have no effect on the presumption. If the trial court were to have a preconceived idea of an accused's guilt or presumed, so to speak, the guilt of the accused from the outset, this would trench on judicial impartiality, not the right to be presumed innocent. After all, judicial impartiality implies, as shall be considered more fully in chapter six, that the presiding officer is to keep an open mind as to the guilt or innocence of the accused throughout the proceedings until judgment.[378] It is submitted in the circumstances that it is not the media that may violate the presumption of innocence when it pronounces on the guilt of an accused before the accused is duly convicted in a court of law, contrary, with respect, to what is suggested by Professor Kobus van Rooyen.[379]

Moreover, it goes without saying that pre-trial publicity would not impose a legal burden or reverse onus on an accused to prove his or her innocence which may give rise to a conviction despite the existence of a reasonable doubt about guilt. This is plainly evident from the case of *S v Shrien Dewani*,[380] where despite extensive virulent pre-trial publicity which painted the accused as guilty, the trial court nevertheless discharged the accused in terms of section 174 of the Criminal Procedure Act, holding that the State had failed to establish a *prima facie* case on which a reasonable person could convict. The presiding officer (Traverso DJP) pointed out that although there was 'strong public opinion that the accused should be placed on his defence', she had 'taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice.'[381] That she could not do if she

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[378] See, for example, *R v Sole* 2001 12 BCLR 1305 (Les) 1330I-1331B.

[379] See Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 1, 9. Van Rooyen opines that 'the presumption of innocence of the accused is more important than freedom of the press', and that even though some speculation in publications may be allowed, the media should nevertheless 'not pronounce on the verdict before the judge has done so.' Nonetheless, Van Rooyen does comment that:

> 'Fortunately judges, who are trained to decide a case on the facts before them, will not be influenced by speculation and views expressed in the media.' (*Ibid* 9).

[380] 2014 JDR 2660 (WCC) para 24.7.

[381] *Ibid* para 24.7.

permitted public opinion to influence her decisions.[382] The discretion to grant or refuse a discharge in terms of section 174 had to be exercised 'judicially',[383] adhering to established legal principles regarding a discharge at the close of the State's case.[384] The Court observed that if courts permitted public opinion, which has no legal basis to influence their judgments, it would lead to anarchy.[385] The Court proceeded to find that in light of the analysis of the State's case, there was no evidence upon which a reasonable court, acting carefully, could convict the accused, and accordingly the Court was obliged to follow the established legal principles regarding a discharge.[386] The Court noted that: 'The law is clear: the evidence of the accused - if he does not incriminate himself can never strengthen the State's case. Even if the accused is therefore a wholly unsatisfactory witness - I will still be left with a weak State case which cannot on any basis pass legal muster.'[387] The Court added that it would be a manifest misdirection to place the accused on his defence in the hope that he would implicate himself during his evidence, when the State had presented insufficient evidence upon which a reasonable court could convict.[388]

It may be said in passing that the *Dewani* case supports the notion that a trial judge is capable of basing his or her decision purely on the evidence presented in court, despite adverse pre-trial publicity that portrays the accused as guilty. It is apparent that Traverso DJP was not swayed by such extraneous material, and discharged the accused at the close of the State's case solely in light of the merits of the case arising at trial, the submissions of counsel and the relevant legal principles. It may be argued that the *Dewani* case illustrates that accusatorial process, where the State must present a case to meet before an accused can be placed on his or her defence, can protect the fairness of a trial from negative pre-trial publicity. The accused *in casu* received a fair trial even in the face of overwhelming, hostile media attention.

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[382] *Ibid* para 24.7. Compare also *S v Makwanyane and Another* 1995 2 SACR 1 (CC) paras 87-89; *S v Mhlakaza and Another* 1997 1 SACR 515 (SCA) 518*e-j*, as to the role of public opinion on the question of sentence, holding that: '[P]ublic opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public.' Rather, it is perhaps the main duty of the court '"to lead public opinion."' (*Ibid* 518*j*).

[383] *S v Dewani* 2014 JDR 2660 (WCC) para 24.8.

[384] *Ibid* para 24.7.

[385] *Ibid* para 24.7.

[386] *Ibid* para 24.7.

[387] *Ibid* para 24.7.

[388] *Ibid* para 24.9, with reference to *S v Lubaxa* 2001 2 SACR 703 (SCA).

Moreover, rather than being violated by adverse pre-trial publicity, the presumption of innocence may serve as a procedural safeguard against error[389] in the face of publicity.

5.4 Beyond the rhetoric of the presumption of innocence

Writing from a South African perspective, CWH Schmidt and H Rademeyer opine that it is doubtful whether the presumption of innocence, insofar as criminal procedure is concerned, is actually a presumption in the legal technical sense.[390] Neither the incidence nor the standard of the burden of proof is dependent on a presumption for its existence and application.[391] The cardinal principle of the onus of proof, namely that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made, ensures already that the prosecution bears the burden of proof.[392] And a policy, evidential rule guarantees that the higher standard of proof beyond a reasonable doubt applies in a criminal trial.[393]

This raises the question of whether the presumption of innocence is not simply a rhetorical maxim, having the appearance and sound of a fundamental legal doctrine, but lacking in any meaningful, independent content. If the presumption of innocence 'is in truth merely another form of expression'[394] or 'synonym'[395] for or 'a reminder'[396] of the trite, common-law rule that the onus is on the prosecution to prove its case against the accused beyond a reasonable doubt, one may ask whether the presumption is not simply a redundant concept by virtue of being devoid of independent content, thus effectively having no practical significance for the accused.

In tackling this question, William Laufer[397] posits that in order to prevent the presumption of innocence from simply being reduced to an 'ineffective rhetorical

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389 See Hamer (2011) *Oxford Journal of Legal Studies* 417, 426.
390 CWH Schmidt & H Rademeyer *Bewysreg* 4 uitg (2000) 157.
391 *Ibid* 157.
392 *Ibid* 157.
393 *Ibid* 157.
394 *Wigmore on Evidence* § 2511.
395 Thayer *A Preliminary Treatise on Evidence at the Common Law* 554.
396 Allen *Legal Duties* 293-294.
397 At the time of writing, Laufer was Assistant Professor of Legal Studies, Wharton School, University of Pennsylvania.

device', the presumption ought not to be construed as a presumption of 'legal innocence' in terms whereof the burden of production and persuasion falls on the prosecution to prove guilt beyond a reasonable doubt, that is, where an accused remains 'legally innocent' until or unless such proof is introduced.[398] In other words, to bolster the normative value of the presumption of innocence, the presumption should not be construed as a 'burden allocation device'.[399] Laufer argues that the presumption of innocence may be given meaning only by moving away from the notion that the presumption is a rule regulating the location and standard of the onus of proof, and instead, 'toward the view that factual innocence of the accused must be assumed.'[400] Laufer believes that 'the presumption of innocence is not held out as a fundamental right because it amplifies the burden of proof or conveys intangible messages to criminal justice functionaries.'[401] Instead, the presumption of innocence derives meaning from promoting or enhancing the right to a fair trial, and more specifically, the impartiality required of the trier of fact through the assumption of factual innocence.[402]

PJ Schwikkard comments, however, that while Laufer acknowledges the weight of authority that supports an equation of the presumption of innocence with the rule regulating the burden and standard of proof, he nonetheless proceeds to conflate the presumption and other substantive and procedural safeguards in determining the content of the presumption.[403] Schwikkard notes that Laufer's argument that the presumption of innocence should be reconstructed so as to include an assumption of factual innocence 'is premised on the assertion that a factual presumption of innocence is required to counter juror partiality.'[404] As submitted above, such is not the function of the presumption of innocence within the

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[398] Laufer (1995) *Washington Law Review* 329.
[399] *Ibid* 403.
[400] *Ibid* 403. According to Laufer, the distinction between legal innocence and factual innocence is that the former 'stands in for the idea that the state has not met its burden of proof beyond a reasonable doubt and that the accused, therefore, lacks criminal culpability or responsibility'; the term 'legal innocence' is tantamount to the absence of 'legal guilt' or a finding of 'not guilty'. (*Ibid*). Laufer explains that: 'An accused is legally innocent until or unless guilt (legal guilt) is established beyond a reasonable doubt. All defendants, whether guilty in fact or not, are legally innocent until or unless convicted. If convicted, whether factually guilty or not, one is legally guilty… Legal innocence and legal guilt require a judicial determination of whether an accused committed the criminal act beyond a reasonable doubt.' (*Ibid* 331 n 4). Laufer notes that 'factual innocence', on the other hand, 'is simply the state of being innocent in fact.' (*Ibid* 331 n 4).
[401] *Ibid* 403.
[402] *Ibid* 392-394, 404-405.
[403] Schwikkard *Presumption of Innocence* 36 n 46, 39 n 57.
[404] *Ibid* 30 n 5.

purview of the right to a fair trial in terms of section 35(3) of the South African Constitution; the conflation of the presumption with judicial impartiality does not accord with the structure of the Bill of Rights and the presumption's common-law and constitutional meaning as amply reaffirmed by the Constitutional Court.

Larry Laudan is critical of the view that the trier of fact at the outset of a criminal trial must believe that the accused is materially innocent or innocent in fact, that is, that he or she did not commit the crime with which he or she is charged, which a presumption of material or factual innocence entails.[405] Since a trier of fact is '*never* called upon to affirm' the accused's material or factual innocence but to find the accused not guilty if the prosecution fails to prove its case beyond a reasonable doubt, thereby affirming the accused's 'probatory innocence',[406] Laudan raises the question why it should be expected of the decision-maker to presume the accused's factual innocence at the inception of the trial.[407] Laudan argues that to presume in these circumstances at the beginning of the trial that the accused did not in fact commit the crime 'is at best gratuitous.'[408] Laudan disputes that any rational person can believe 'an empirical proposition', in the absence of any evidence or arguments for the truth thereof.[409] Would it then be realistic for a trier of fact to adopt an assumption, ie 'a belief', that the accused did not commit the crime without being given any evidence for such proposition?[410] Laudan argues that a trier of fact may believe that the accused is not materially innocent but may nevertheless not yet be sufficiently sure that guilt has been proved beyond a reasonable doubt for a conviction.[411] If that be the case, Laudan raises the question why the trier of fact should be required at the outset of the trial to believe that the accused is innocent in fact.[412] Laudan opines that a presumption of material or factual innocence is not necessary because material or factual innocence 'is not presupposed by even the most defendant-favorable outcome of a trial: an acquittal.'[413] This is so when it is considered that American appellate courts have repeatedly emphasised that 'an

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405 Laudan (2005) *Legal Theory* 343-350.
406 *Ibid* 343, 350 (author's emphasis). Laudan states that the criminal justice system does not routinely make a finding of the factual or material innocence of an accused. (*Ibid* 343).
407 *Ibid* 343.
408 *Ibid* 350.
409 *Ibid* 344-345.
410 *Ibid* 344.
411 *Ibid* 345.
412 *Ibid* 345.
413 *Ibid* 348.

acquittal is neither less nor more than an assertion by the trier of fact that the case offered by the prosecution failed to satisfy the relevant standard of proof.'[414] In this sense, according to Laudan, an acquittal is 'agnostic' about the material or factual guilt or material or factual innocence of the accused.[415] It is, then, writes Laudan, pointless and gratuitous to insist that the trier of fact at the beginning of a trial must adopt a belief about material innocence much stronger than what he or she will later assert if he or she decides to acquit. There is no conceivable reason for saying that the accused should on the opening day of his or her trial be considered materially innocent in a more robust sense of that term than he or she is when his or her trial ends in acquittal. Yet that is precisely what the presumption of material or factual innocence requires.[416] Laudan notes that in contrast, probatory innocence, in terms whereof an accused is not guilty for lack of evidence that satisfies the standard of proof beyond a reasonable doubt, 'makes no stronger an assumption about the defendant's innocence at the opening of a trial than an acquittal implies at its end.'[417]

Laudan maintains that the presumption of innocence should be construed as a presumption of probatory innocence, 'that is, guilt not yet established', rather than one of material or factual innocence.[418] The writer explains that the trier of fact should 'assume' at the inception of the trial that he or she has '*no* conclusive proof of guilt', and indeed, '*no proof at all*' at that stage.[419] Laudan asserts that if we want a fair trial for the accused, we expect the trier of fact to begin the trial 'by supposing' that if the State fails to prove the guilt of the accused beyond a reasonable doubt, he or she will end up acquitting the accused.[420] Laudan suggests that instead of beginning a trial with a strong belief in the material or factual innocence of the accused, the trier of fact must believe that the accused's guilt has not yet been proved.[421] For Laudan, a 'fair-minded' trier of fact is one who is 'open-minded about the eventual outcome of the trial', and one who 'concedes' that he or she has no

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[414] *Ibid* 347. In, for example, *United States v Isom* 886 F.2d 736 738 (1989), it was held that:

> 'A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence.'

See also, for instance, *United States v Lawing* 703 F.3d 229 241 paras 26, 27 (2012), where this principle was cited with approval and applied.

[415] Laudan (2005) *Legal Theory* 347.

[416] *Ibid* 348.

[417] *Ibid* 348.

[418] *Ibid* 347.

[419] *Ibid* 347 (author's emphasis).

[420] *Ibid* 347.

[421] *Ibid* 350.

proof about guilt at the start of the trial and therefore 'lacks any clue about which side will eventually prevail.'[422] It is probatory innocence, that is, a case not yet proved beyond a reasonable doubt, which is the 'proper focus' of the presumption of innocence.[423] The corollary of such a presumption would be that the State must proceed to prove its case against the accused beyond a reasonable doubt.

Laudan raises the pertinent question of what task remains to be discharged by the presumption of innocence, if it is accepted that the burden and standard of proof are already encapsulated or 'accommodated' in the presumption.[424] Laudan postulates that '[t]he important work remaining to be done by a presumption of innocence in these circumstances is that of making it entirely explicit that the defendant begins the trial without prejudice', that is to say, with a 'clean slate'; such being an 'element of the [presumption of innocence] that is not already present, at least not explicitly, in the standard of proof and the burden of proof.'[425] Insofar as the presumption of innocence has independent content and thus a non-derivative role in a trial, the doctrine of the presumption 'is embodied in the thesis that the defendant begins the trial with a clean slate',[426] that is, with no evidence of guilt. This prevents the presumption of innocence from being a redundant concept; *a fortiori* when it is considered that '[m]uch of the content traditionally associated with the [presumption of innocence] is already contained expressly in the doctrines of the burden of proof and the standard of proof.'[427]

Laudan reiterates that the presumption of innocence, properly understood, 'is little more but no less than an assumption of no-proof-of-guilt at the outset of a criminal trial.'[428] The writer argues that if the presumption of innocence is understood in this way, it would largely be beside the point whether the trier of fact holds any preconceived beliefs about the guilt or innocence of the accused, save for 'egregious cases of prior bias.'[429] What is more fundamentally important is that the trier of fact not only understands, but is also prepared to act on, 'the notion that the defendant must be acquitted unless the prosecution has satisfied the relevant

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[422] *Ibid* 349.
[423] *Ibid* 358.
[424] *Ibid* 358.
[425] *Ibid* 358.
[426] *Ibid* 360.
[427] *Ibid* 360.
[428] *Ibid* 359.
[429] *Ibid* 359.

standard of proof.'[430] This is so bearing in mind that a belief in material or factual innocence 'is not a precondition for an acquittal.'[431] Laudan notes that any focus on the adjudicator's private beliefs about guilt and innocence directs attention away from what should be the central concern of the presumption of innocence: 'the satisfaction of the standard of proof.'[432]

James Thayer had a similar view of the presumption of innocence entailing that the accused starts the trial with a clean slate and whatever wrong or guilt is to be inscribed on it must be the result of legal evidence presented to the trial court.[433] In *United States v Schneiderman*, it was likewise held, citing with approval Thayer:[434]

> The presumption of innocence is but the reverse side of the talisman which lays upon a prosecutor the burden of proof of guilt beyond a reasonable doubt before the law will countenance a conviction… Which is to say that where the issue to be tried and adjudicated is guilt or innocence, the accused starts the trial of that issue with a clean slate; and "at the trial the accused while kept well guarded, a prisoner, is yet to be treated as if no incriminating fact existed."

It is submitted that while Laudan's theory on what the presumption of innocence actually represents beyond the rhetoric, is a more coherent description of the presumption than Laufer's, it would seem that the important task which the right to be presumed innocent fulfils in a South African context is to *constitutionally enshrine* the allocation of the burden of proof on the prosecution and the attendant reasonable doubt standard; in other words, the presumption makes it a constitutional imperative that the prosecution bears the onus of proving the accused's guilt beyond a reasonable doubt,[435] as such a rule accords with substantive fairness and is aimed at minimising an erroneous conviction.[436] Laudan's observations are also perhaps more applicable in a jury system; trained judicial officers would know at the inception of a criminal trial that there is as yet no proof of guilt, that the accused starts the trial

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[430] *Ibid* 359.

[431] *Ibid* 359.

[432] *Ibid* 359.

[433] Thayer *A Preliminary Treatise on Evidence at the Common Law* 562. See also Ho 'The Presumption of Innocence as a Human Right' in *Criminal Evidence and Human Rights* 272, adding that:

> 'Why should it be required that the accused start the trial, as it were, with a clean probatory slate? The very fact that the accused is being tried, that the person is standing in the dock, indicates significant probability that she is guilty as charged.'

[434] 102 F.Supp 52 59 para 9 (1951).

[435] See *S v Mbatha; S v Prinsloo* 1996 1 SACR 371 (CC) para 7; *S v Singo* 2002 2 SACR 160 (CC) para 26.

[436] Morton & Hutchison *The Presumption of Innocence* 6. See also De Villiers (2003) *THRHR* 635; *S v Shangase and Another* 1994 2 SACR 659 (D) 665*c-d*.

with a clean slate and that nothing is to inferred from the accused's present circumstances.

5.5 The application of the presumption of innocence in the South African accusatory trial: No onus on the accused

The South African Constitution mandates through the right to be presumed innocent that the State must establish the guilt of an accused beyond a reasonable doubt; it is not required of the accused to establish his or her innocence.[437] Moreover, it is in accordance with the policy that no accused should be punished for a crime without proof of his or her guilt that the common law, which was designed to safeguard the rights of the individual,[438] 'deliberately places the burden of proving every disputed issue, save insanity, on the prosecution.'[439] The general principle is that insufficient or defective proof can never authorise punishment.[440] Due process commands that no person shall lose his or her liberty unless the State has borne the burden of producing the evidence and convincing the fact-finder of his or her guilt.[441] There is no onus on an accused to prove his or her innocence or to disprove an element of the offence charged.[442] All the accused need do is raise reasonable doubt.[443] The 'fundamental principle is that, when an accused pleads not guilty, he raises the general issue whether or not he is guilty or innocent of the offence charged; the burden of proving his guilt then rests throughout on the prosecution; and it is not for

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[437] *S v Singo* 2002 2 SACR 160 (CC) para 26.

[438] De Villiers *Problematic Aspects of the Right to Bail under South African Law* 237.

[439] *Mabaso v Felix* 1981 3 SA 865 (A) 872G-H, recognised by the Constitutional Court in *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC) para 37.

[440] Summers (2001) *The Juridical Review* 54.

[441] *Speiser v Randall* 357 US 513 526 (1958).

[442] *R v Ndhlovu* 1945 AD 369 386; *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 3 SA 79 (T) 88I-89D; *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) para 13; *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC); *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) paras 6-7; *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 121; *S v Combrink* 2012 1 SACR 93 (SCA) para 15; *S v Majiame en Andere* 1999 1 SACR 204 (O) 214*a-d*; *S v Nkuna* 2012 1 SACR 167 (B) para 121; *S v Carstens* 2012 1 SACR 485 (WCC) para 13; AV Lansdown & J Campbell *South African Criminal Law and Procedure (formerly Gardiner and Lansdown): Volume V: Criminal Procedure and Evidence* (1982) 909; T van der Walt 'The right to a fair criminal trial: A South African perspective' (2010) 7 *US-China Law Review* 29 34: 'Accused persons have the right to be presumed innocent. They do not have to prove their innocence. It is the duty of the state to prove the guilt of the accused beyond a reasonable doubt.' See also *S v Chogugudza* 1996 3 BCLR 427 (ZS) 430D.

[443] *S v Singo* 2002 2 SACR 160 (CC) para 25; *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) para 12; *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 3 SA 79 (T) 89C-D; *S v Carstens* 2012 1 SACR 485 (WCC) para 13.

the accused to prove his innocence by, for example, proving self-defence or some other excuse or justification, although, of course, he must raise it as a defence in the course of the proceedings.'[444] The accused is constitutionally entitled to an acquittal if there is reasonable doubt as to his or her guilt.[445]

Where the State charges an accused for criminal wrongdoing and asks a court to adjudicate, the presumption of innocence is not only a constitutional precept to be applied, but also a logical necessity because it simply means that the State cannot accuse without proof; conversely, it is 'illogical' to require that the person against whom allegations are made must produce evidence in order to disprove the accusations.[446] This principle is expressed in the Latin maxim: *ei incumbit probatio qui dicit, non qui negat* – the burden of proving a fact rests on the party who asserts it, not on the party who denies it.[447] It is a cardinal principle of all legal procedure that whoever moves a court to give judgment against any person in respect of any legal right or liability must prove to that court the existence or non-existence of the facts upon which, or upon the absence of which, he or she claims the right or liability to depend.[448] A prosecutor who alleges the commission of a crime and claims from the court that the offender should be punished therefor must, if his or her claim is to succeed, prove his or her allegation beyond reasonable doubt.[449] The rule which requires that no conviction shall take place unless proof is such as to satisfy a court of the truth of the allegations beyond a reasonable doubt 'is accentuated by the presumption of innocence which, in law, operates in favour of every accused person.'[450] Moreover, given the disparity in resources between the State and the accused, the burden of proof rests on the prosecution to prove the guilt of the accused beyond a reasonable doubt.[451] That the prosecutor should, except where he or she has made exculpatory evidence available to the defence, place before the court all material necessary for the investigation of the truth is justified on the ground

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[444] *Mabaso v Felix* 1981 3 SA 865 (A) 872F. See also Lansdown & Campbell *South African Criminal Law and Procedure: Volume V* 909-910.
[445] *S v Baloyi* 2000 1 SACR 81 (CC) para 15.
[446] Zupančič (1982) *Journal of Contemporary Law* 119-120. See also *Pillay v Krishna and Another* 1946 AD 946 952:

> '"He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute."'

[447] *Pillay v Krishna and Another* 1946 AD 946 952; GP Fletcher *Rethinking Criminal Law* (1978) 520.
[448] Lansdown, Hoal & Lansdown *South African Criminal Law and Procedure: Volume 1* 459.
[449] *Ibid* 459.
[450] *Ibid* 460.
[451] Steytler (1982) *SACC* 278. See also Schwikkard *Presumption of Innocence* 14.

that the prosecution has all the resources of the State, including finances, the police and vital information at its disposal.[452]

In *S v Lavhengwa*, it was held that '[t]he presumption of innocence entails at least that a criminal trial should conform to the following rules':[453]

1. The State has the duty to begin. It has to make out a case against the accused before he needs to respond, whether by testifying, adducing evidence or otherwise.

2. The State bears the burden of proof. It is required finally to satisfy the court of the guilt of the accused in order to secure a conviction.

3. The required standard is proof beyond reasonable doubt.

Thus, the protection which the presumption of innocence provides is wider than merely reducing the possibility of a conviction despite the existence of a reasonable doubt.[454] Wium de Villiers explains that '[a]ny provision which requires the accused to adduce evidence first, which burdens him with the onus of proof, or which lowers the standard of proof required, offends the presumption of innocence and would have to be justified in terms of the general limitation provision. This applies not only to the elements of the offence but to every issue relating to the innocence or guilt of the accused. It applies equally to a defence, excuse, justification or exception.'[455]

The presumption of innocence and burden of proof determine the sequence of evidence, with the State therefore in criminal proceedings always having the duty to begin.[456] It is only once the State has established a *prima facie* case against an accused, or a case to meet or case to answer,[457] that the accused can be placed on his or her defence.[458] The protection that the presumption of innocence (which

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[452] Steytler *The Undefended Accused on Trial* 136. See also De Villiers (2003) *THRHR* 635; *R v Filanius* 1916 TPD 415 417-418; *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131F.

[453] 1996 2 SACR 453 (W) 485*c-e*.

[454] De Villiers *Problematic Aspects of the Right to Bail under South African Law* 237-238.

[455] *Ibid* 238 (footnote omitted).

[456] CWH Schmidt & DT Zeffertt (updated by DP van der Merwe) 'Evidence' in WA Joubert (founding ed) *The Law of South Africa: Volume 9* 2 ed (2005) paras 773, 842 ('In criminal proceedings the state adduces evidence and, unless application for the discharge of the accused succeeds, the accused then leads his or her evidence' (footnote omitted)); Sections 150 and 151 of the Criminal Procedure Act.

[457] In Schwikkard & Van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in *Principles of Evidence* 602 (para 31 2), it is pointed out in this regard:

> 'It is a fundamental principle of our law that in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. At the outset of the trial, in tandem with the burden of proof, the state must also discharge an evidential burden. It will do this by establishing a *prima facie* case against the accused.'

[458] The effect of establishing a *prima facie* case was explained in *S v Lubaxa* 2001 2 SACR 703 (SCA) para 11 as follows, apropos the provisions of section 174 of the Criminal Procedure Act: 'If, in

embodies the principle of a 'case to meet') affords is that the prosecution must prove its case before there can be any expectation that the accused will respond.[459] A *prima facie* case has been crisply described as 'one in which the prosecution case is complete on all inculpatory elements of the offence and sufficient in the sense that a reasonable trier of fact could find that the evidence comes up to proof beyond reasonable doubt.'[460] Once a *prima facie* is established, an evidential burden, or evidentiary burden or burden of rebuttal, will shift to the accused to adduce evidence in order to escape conviction.[461] When an evidential burden is imposed on an accused, 'there needs to be evidence sufficient to give rise to a reasonable doubt to prevent conviction.'[462] There is no obligation on an accused to testify or adduce evidence.[463] If, however, the State has made out a *prima facie* case or a case to answer and the accused fails to produce evidence to rebut that case, the accused 'is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence.'[464] In *S v Boesak*, the Constitutional Court held in the latter respect:[465]

> The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the

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the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward - the accused may not be discharged and the trial must continue to its end.' See also *S v Legote en 'n Ander* 2001 2 SACR 179 (SCA) para 9; *S v Maliga* 2015 2 SACR 202 (SCA) para 18; Bennun (2005) *SACJ* 291.

[459] A Skeen 'A Bill of Rights and the Presumption of Innocence' (1993) 9 *South African Journal on Human Rights* 525 534.

[460] P Healy 'Risk, Obligation and the Consequences of Silence at Trial' (1997) 2 *Canadian Criminal Law Review* 385 398. See also Schwikkard *Presumption of Innocence* 128, and the discussion in Bennun (2005) *SACJ* 290-296 as to what constitutes a *prima facie* case.

[461] Schwikkard & Van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in *Principles of Evidence* 602 (para 31 2); Schwikkard *Presumption of Innocence* 19; Schmidt & Zeffertt 'Evidence' in *The Law of South Africa: Volume 9* para 839; Zeffertt & Paizes *The South African Law of Evidence* 129; *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 2 SACR 145 (CC) para 75 n 99; *S v Singo* 2002 2 SACR 160 (CC) para 27; *Pillay v Krishna and Another* 1946 AD 946 952-953; *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 3 SA 79 (T) 88I-89D; *S v Carstens* 2012 1 SACR 485 (WCC) para 13; Williams *The Proof of Guilt* 184-186; Lansdown, Hoal & Lansdown *South African Criminal Law and Procedure: Volume 1* 460.

[462] *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 2 SACR 579 (CC) para 12.

[463] This is in line with the presumption of innocence and the accused's right to remain silent and not to testify during the proceedings – see *S v Boesak* 2001 1 SACR 1 (CC) para 24.

[464] *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) para 22.

[465] 2001 1 SACR 1 (CC) para 24.

> absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.

The burden of proof remains, nevertheless, with the prosecution throughout and does not shift to the accused.[466] The presumption of innocence continues up to the verdict.[467] It is possible that even if an accused does not adduce evidence, he or she will not be convicted if the court is satisfied that the State has not proved guilt beyond a reasonable doubt.[468] If at the conclusion of a criminal case, the prosecution has not discharged the onus resting on it, the accused is entitled to an acquittal.[469] It is trite that in order to discharge the burden of proof, the State must prove all the elements of the offence charged.[470] The presumption of innocence also requires the State to prove the absence of any defence raised by the accused.[471]

A logical consequence of the presumption of innocence as a constitutional right determining the allocation and standard of proof 'is that an evidentiary burden cannot shift to the accused until the prosecution has established a *prima facie* case.'[472] To place the accused on his or her defence in the absence of a *prima facie* case violates the right to be presumed innocent, because in such an instance the prosecution is effectively absolved from overcoming the first hurdle in proving guilt beyond a reasonable doubt.[473] PJ Schwikkard explains in this regard that '[t]he premature shifting of the evidentiary burden infringes that part of the presumption of innocence that places the incidence of the burden of proof on the state.'[474] In *S v Mathebula and Another*, Claassen J found that to continue with a trial in circumstances where at the close of the State's case there is no evidence implicating the accused in the alleged crime, renders the trial unfair in that 'to continue the trial

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[466] Schwikkard & Van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in *Principles of Evidence* 602-603 (para 31 2).

[467] *S v Britz* 1963 1 SA 394 (T) 397G.

[468] Schwikkard & Van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in *Principles of Evidence* 603 (para 31 2). See also the remarks in Bennun (2005) *SACJ* 295.

[469] Lansdown, Hoal & Lansdown *South African Criminal Law and Procedure: Volume 1* 460; *S v Britz* 1963 1 SA 394 (T) 397F:

> '[I]t is a universal presumption that an accused person is to be taken as innocent until a competent court has pronounced him guilty, on competent evidence, which leaves no doubt to the reasonable, honest mind. The *onus* of proof lies on the prosecutor, and, if at the conclusion there remains a reasonable doubt as to the guilt of the accused the *onus* is not discharged and he is entitled to an acquittal'.

[470] Schwikkard *Presumption of Innocence* 19.

[471] *Ibid* 19. See also Lansdown & Campbell *South African Criminal Law and Procedure: Volume V* 909-910.

[472] Schwikkard *Presumption of Innocence* 128.

[473] *Ibid* 129.

[474] *Ibid* 129.

would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness.'[475] Claassen J also underlined that it is patently clear that it would be grossly unreasonable and not justifiable in an open and democratic society based on freedom and equality 'that an accused, vested with all the higher order rights, should be put on his defence when no incriminating evidence came from the mouth of the State.'[476] After all, as another court appositely pointed out, albeit in a different context, an 'accused is entitled to adopt an adversarial attitude to the prosecution' and he or she 'is not obliged to give assistance to the prosecution', such being firmly embedded in our system of criminal justice and enshrined in the Constitution, for example, in the provisions which give the accused the right to be presumed innocent and to remain silent during the trial and the right not to be a compellable witness against him- or herself.[477] The accused need lend no aid to the prosecution, which is implicit in the presumption of innocence.[478] A profound sense of injustice arises where an accused, particularly an unrepresented accused who is unfamiliar with legal procedure, is left to bring about his or her own conviction, after the State, as the accuser, has failed to produce a case to answer.[479] It is grossly irregular to put an accused on his or her defence and expose him or her to the risk of a wrong conviction when the State has not made out a *prima facie* case.[480]

For these reasons, an accused person is entitled to be discharged at the close of the case for the prosecution in terms of section 174 of the Criminal Procedure Act, if, as found by the Supreme Court of Appeal in *S v Lubaxa*, 'the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict…) that the accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge.'[481] Even where an accused is defended, a trial court must consider *mero motu* at the close of the State's case whether there is a *prima facie* case on which to place the

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[475] 1997 1 SACR 10 (W) 35*b*-*c*.
[476] *Ibid* 35*i*-36*a*.
[477] *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others* 1994 2 SACR 734 (E) 758*e*-*f*.
[478] Goldstein (1974) *Stanford Law Review* 1017.
[479] *S v Lubaxa* 2001 2 SACR 703 (SCA) para 17.
[480] *S v Van Rooyen* 2002 1 SACR 660 (T) paras 9-10, per Bosielo J (as he then was). See also *S v Phika* 2018 1 SACR 392 (GJ) para 29, where it was observed that there is no evidential burden on an accused to adduce rebutting evidence where the State's evidence is poor and unsatisfactory.
[481] 2001 2 SACR 703 (SCA) paras 10, 18.

accused on his or her defence, and if not, the court is duty-bound to direct an acquittal.[482]

In *Lubaxa* it was held that 'an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is… a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'[483] The Court in *Lubaxa* added, however, that the right to be discharged at the close of the case for the prosecution where there is no evidence on which a reasonable person may convict, does not necessarily arise from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but from a consideration that is of more general application, namely that 'a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated…, and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12 [of the Constitution]) seems to reinforce it.'[484] The Court concluded therefore that 'if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial… would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12 [of the Constitution].'[485]

Contrast this with the position in inquisitorial systems, where an accused is first advised of his or her right to remain silent, but if the accused nevertheless elects

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[482] *S v Legote en 'n Ander* 2001 2 SACR 179 (SCA) para 9.

[483] 2001 2 SACR 703 (SCA) para 18.

[484] *Ibid* para 19.

[485] *Ibid* para 19. The Court, however, went on to find that:

> 'The same considerations do not necessarily arise… where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly.' (*Ibid* para 20).

to speak he or she 'is examined at the *outset* of the trial by the judge.'[486] At the close of such examination by the trial judge, the judge 'must allow the prosecutor and the defense counsel to question the defendant to supplement his testimony and test the accuracy of his statements.'[487] Comparativists 'point especially to the use [in inquisitorial systems] of the accused as the primary source of evidence, both during the investigation and at trial.'[488] The accused 'is ordinarily called as *the first witness* and is questioned closely by the presiding judge about the facts of his life and his knowledge of the crime'; '[f]ew rules of evidence inhibit the judge and *the state has no explicit burden of proof or persuasion*.'[489] It is '[t]he judge [who] dominates the proceeding and *often appears to move relentlessly toward a predetermined result of conviction*.'[490]

In the accusatorial system it is the accuser who must, in the first instance, present reasonably persuasive evidence of guilt. It is in this sense that the presumption of innocence lies at the very heart of such a system.[491]

While Continental writers often overstate their case with regard to the truth deficit in adversarial process, they ignore the fact that 'the accused in the adversarial system is not obliged to present evidence *a decharge*, ie is not obliged to disprove guilt. They tend to ignore the fact that, because of the… right to silence, and the presumption of innocence, the accused may simply rest his case and let the [prosecution] meet the high standard of "beyond reasonable doubt". There is no obligation on the part of the accused, either to prove innocence, or to collaborate with the case against him or her.'[492]

In the circumstances, it is submitted that the South African accusatorial procedure in terms whereof the accused must be discharged at the close of the case for the State if the prosecutor has failed to establish a *prima facie* case, can serve as a procedural safeguard that protects the rights of the accused in the face of

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[486] Jescheck (1970) *Virginia Law Review* 247, where the writer discusses the different position of the accused in German criminal procedure and that of American law (my emphasis). See also, for example, Brouwer (1981) *The Australian Law Journal* 217.
[487] Jescheck (1970) *Virginia Law Review* 247.
[488] Goldstein (1974) *Stanford Law Review* 1018.
[489] *Ibid* 1018 (my emphasis). See also Trechsel *Human Rights in Criminal Proceedings* 167.
[490] Goldstein (1974) *Stanford Law Review* 1018 (my emphasis).
[491] *Ibid* 1017.
[492] W van Caenegem 'Advantages and Disadvantages of the Adversarial System in Criminal Proceedings' in *Review of the criminal and civil justice system in Western Australia: Project 92: Consultation Papers: Volume 1* (June 1999) 69 81 <http://www.lrc.justice.wa.gov.au/_files/P92_Consultation_Papers_vol1.pdf> (accessed 14-05-2018).

prejudicial pre-trial publicity.[493] The trial does not start with the accused who must effectively prove his or her innocence, at a stage when pre-trial publicity may be foremost in the mind of the presiding officer. The presumption of innocence, in particular, means that the accused cannot be placed on his or her defence unless the State produces *evidence* sufficient to call for an answer. Any preconceptions or preconceived ideas in the mind of the presiding officer brought about by adverse pre-trial publicity may dissipate when the State begins to adduce evidence to make out a *prima facie* case, when, that is, the adversarial contest is commenced and the court's attention is focused on the evidence produced. After all, a 'point-counterpoint method' of proceeding 'helps achieve unprejudiced adjudication. Empirical evidence suggests that once a judge or fact finder adopts a bias - tentatively decides an issue in favor of one party - it becomes difficult to change that opinion. By introducing dispute at each stage of the proceedings (for example, through cross-examination and counter-arguments), adversarial presentation tends to keep tribunals uncommitted until all the evidence is in.'[494] It is only where the arbiter's mind is so clogged with prejudice by what he or she has read, heard or seen in the media about an accused and the case, that he or she may not be swayed by the evidence adduced at trial. Fortunately, however, as Professor Van Rooyen points out, judges, who are trained to decide a case on the facts before them, may not be influenced by speculation and views expressed in the media.[495] The high or heavy standard of proof[496] is a further '*safeguard of due process*' or a fair trial[497] which reduces the possibility of an erroneous conviction. The presumption of innocence is a pivotal safety mechanism[498] which guarantees that an accused may not be convicted of the crime charged unless the State discharges its onus of presenting *evidence* that

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493 Compare *S v Dewani* 2014 JDR 2660 (WCC).

494 Zacharias (1991) *Vanderbilt Law Review* 54 (footnote omitted).

495 Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9.

496 It is beyond the scope of this work to attempt to define the concept of proof beyond a reasonable doubt. However, in Dlamini (1998) *SACJ* 423, an analysis is given of its meaning. Some commentators suggest that the reasonable doubt standard is proof which rules out every reasonable hypothesis except that of the guilt of the accused, akin to the inference to be made on circumstantial evidence; the so-called 'no-other-reasonable-hypothesis rule' – see L Laudan 'Is Reasonable Doubt Reasonable?' (2003) 9 *Legal Theory* 295 322; Laudan (2005) *Legal Theory* 350-356; AAS Zuckerman *The Principles of Criminal Evidence* (1989) 134-140. Such a conception of the phrase 'proof beyond a reasonable doubt' would seem to accord with Tindall JA's observation in *R v Blom* 1939 AD 188 210 that '"before a man is convicted of a crime, every supposition not in itself improbable which is consistent with his innocence ought to be negatived."' See also Lansdown & Campbell *South African Criminal Law and Procedure: Volume V* 909.

497 *Leland v Oregon* 343 US 790 802-803 (1952), per Frankfurter J (my emphasis).

498 Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* 176.

satisfies the court that the accused's guilt has been proven beyond a reasonable doubt. The presiding officer's fact-finding discretion is ultimately strongly constrained in favour of the presumption of innocence.[499]

[499] Waye (2003) *Melbourne University Law Review* 441.

CHAPTER 6

JUDICIAL IMPARTIALITY & PROCEDURAL SAFEGUARDS

The presumption of innocence, the prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias.[1]

Judicial neutrality is the cornerstone of the adversarial system; without that, there seems to be little to be said for it.[2]

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness.[3]

6. Introduction

In this chapter the constitutional principle and notion of judicial impartiality in adjudication or decision-making are analysed. Procedural safeguards or judicial mechanisms which are designed to guarantee impartiality in adjudication and to rid the influence of prejudice or bias, are recapitulated. Further pertinent safeguards, or means to promote judicial impartiality, are also examined. In analysing these topics, the following issues will be addressed: (i) judicial impartiality as an element of the right to a fair trial; (ii) the nature and content of judicial impartiality; (iii) the distinction between impartiality and judicial independence; (iv) the character of judicial bias; (v) the right of recusal; (vi) the nature of judicial decision-making in criminal cases; (vii) the influence of the inarticulate premises or human factor in judicial decision-making; (viii) safeguards, including the appeal or review system and judicial training.

6.1 The right to a fair trial

> [L]et us bear in mind that one of man's most passionate quests is for justice, and no man is so violently antisocial as the man who believes that he has not had a fair trial or that his rights have been infringed.[4]

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[1] *People v Branch* 46 NY 2d 645 652 (1979).
[2] McEwan *Evidence and the Adversarial Process* 13.
[3] *In re JP Linahan* 138 F.2d 650 651 (1943), per Frank J.
[4] AJ Milne 'Equal Access to Free and Independent Courts' (1983) 100 *The South African Law Journal* 681 688.

It is a universal principle that the resolution of legal disputes must be done in such a way that reasonable litigants leave court with the feeling that they were given a proper opportunity to state their respective cases, that their cases were presented in the best possible light and manner, and, further, that the issues were decided by an impartial arbiter.[5] There may be few universals in life, but dispute resolution that is even-handed and detached is a virtue that is widely prized.[6]

The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognised in key international human rights instruments.[7]

The criminal justice system aims to punish only those persons whose guilt has been established in a fair trial.[8]

In a South African criminal trial, the accused has a constitutionally guaranteed right to a fair trial. The accused's right to a fair trial 'seeks to provide procedural fairness before the state intrudes upon core rights of a person, namely, dignity (the public denouncement as guilty in a status degrading ceremony), liberty (detention or imprisonment) and property (the imposition of a fine or forfeiture).'[9] In the Constitutional Court decision of *S v Coetzee and Others*, O'Regan J found that the right to a fair trial 'recognises that before the state can impose a criminal sanction on a person, that person must have been afforded a fair trial', and that in so doing, the right 'focuses on the importance of procedural fairness - long a cherished value in democratic societies.'[10]

Moreover, Wium de Villiers remarks that '[t]he criminal justice process constitutes an interference with the liberty of the subject by the state starting with the framing of laws which prohibit conduct. This is followed by the arrest and detention of suspects, the process of determining guilt, the passing and enforcing of sentence, up to the restoration of the subject's liberty, either upon acquittal or the setting aside

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[5] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 9 (para 1 4).
[6] JA Widner *Building the Rule of Law* (2001) 41.
[7] *S v Jaipal* 2005 1 SACR 215 (CC) para 26.
[8] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 23.
[9] Steytler *Constitutional Criminal Procedure* 208.
[10] 1997 1 SACR 379 (CC) para 186.

of a conviction, or after service of sentence, or on parole.'[11] For these reasons, the writer suggests that the rights of arrested, detained and accused persons guaranteed in section 35 of the Constitution should be regarded as part of or specific instances of the right to freedom and security of the person enshrined in section 12 of the Constitution.[12] It is, however, outside the scope of this work to explore the question of so-called fair trial seepage from section 35(3) of the Constitution into other spheres, or whether section 12 of the Constitution assumes the character and status of a generic and residual due process or fair trial right.

The right to a fair trial, as enshrined in section 35(3) of the Constitution, has been held by the Constitutional Court to be 'a comprehensive right' and one which embraces a concept of 'substantive fairness' which is not to be equated with what might have passed muster in South Africa's criminal courts before the Constitution came into force.[13] Criminal trials are to be conducted in accordance with open-ended notions of basic fairness and justice.[14] The Constitutional Court has taken a 'broad and open-ended' approach to the scope of the right to a fair trial.[15] Elements of this comprehensive right are specifically enumerated in paragraphs (*a*) to (*o*) of section 35(3). However, the words in section 35(3) 'which includes the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in section 35(3) and others not. The right to a fair trial is a 'comprehensive and integrated right', the content of which would be established, on a case by case basis, as the constitutional jurisprudence on section 35(3) develops.[16] Moreover, at the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done.[17] In considering what lies at the heart of a fair trial in the field of criminal justice, it should be borne in mind that dignity, freedom and equality are the foundational values of the Constitution. An important aim of the right to a fair criminal trial is to ensure

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[11] De Villiers (2007) *Law, Democracy & Development* 106-107.
[12] *Ibid* 107.
[13] *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 9; *S v Zuma and Others* 1995 1 SACR 568 (CC) para 16.
[14] *S v Zuma and Others* 1995 1 SACR 568 (CC) para 16; *S v Jaipal* 2005 1 SACR 215 (CC) para 28; *S v Basson* 2007 1 SACR 566 (CC) para 26.
[15] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 22.
[16] *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 9.
[17] *Ibid* para 11.

adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.[18] There are other elements of the right to a fair trial which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.[19]

The right to a fair trial requires a substantive, rather than a formal or narrow textual approach.[20] There is, nonetheless, no such thing as perfect justice: 'fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment.'[21] The right to a fair trial 'requires fairness to the accused, as well as fairness to the public as represented by the State'[22] and 'fairness to the victims of the crime and their families.'[23] The right to a fair trial 'has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'[24] This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.[25]

The Constitutional Court has pointed out that although not specified in section 35(3) of the Constitution, judicial impartiality, which is expressly guaranteed in sections 34 and 165(2) of the Constitution, is also closely linked to, and is indeed 'inherent in', the right of an accused to a fair trial.[26] Nico Steytler observes that '[t]he right to an impartial court is a fundamental principle of the South African common law and a prerequisite for the constitutionally entrenched right to a fair trial.'[27] It is axiomatic that the fairness of a trial is under threat if a court does not apply the law

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[18] *Ibid* para 11.
[19] *Ibid* para 11.
[20] *S v Jaipal* 2005 1 SACR 215 (CC) para 28; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43. See also *S v Bogaards* 2013 1 SACR 1 (CC) para 44: '[T]he right to a fair trial under the Constitution has a normative component which requires courts not merely to follow existing rules of procedure, but to conduct proceedings in a substantively fair manner.'
[21] *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43; *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 5.
[22] *S v Jaipal* 2005 1 SACR 215 (CC) para 29; *S v Basson* 2007 1 SACR 566 (CC) para 26. See also *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43.
[23] *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA) para 32.
[24] *S v Jaipal* 2005 1 SACR 215 (CC) para 29; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43.
[25] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 5.
[26] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 35; *S v Basson* 2007 1 SACR 566 (CC) para 26.
[27] Steytler *Constitutional Criminal Procedure* 266. See also, for example, Erasmus (2015) *Stellenbosch Law Review* 665.

and assess the facts of the case impartially and without fear, favour or prejudice.[28] The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality.[29] In other words, '[a] judicial officer must not only be impartial in practice but also give the appearance of being impartial.'[30] These principles are recognised in many democracies.[31] Judicial independence and impartiality 'are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is therefore important that a tribunal should be perceived as independent as well as impartial'.[32] It also goes without say that a hearing before an impartial court 'improves the quality of judicial decision-making and is therefore the most reliable way of arriving at just outcomes.'[33] The requirement of an impartial arbiter helps to ensure that a decision is based on the merits of the case, that is, on the admissible evidence and submissions of counsel, and not on any bias on the arbiter's part.[34] A further cardinal, and indeed self-evident, reason underlying the imperative of judicial impartiality was well expressed by Cory J in the Canadian decision of *R v S (RD)*, as follows:[35]

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

It has been seen in chapters three and four that as decision-makers in an adversarial judicial system, the judiciary must be held to the highest standards of independence and impartiality. An essential characteristic of such a system is that the presiding judicial officer appears as an impartial arbiter between the parties.

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[28] *S v Basson* 2007 1 SACR 566 (CC) para 26. See similarly, *S v Jaipal* 2005 1 SACR 215 (CC) para 31; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 14.
[29] *S v Basson* 2007 1 SACR 566 (CC) para 27.
[30] Steytler *Constitutional Criminal Procedure* 266.
[31] *S v Basson* 2007 1 SACR 566 (CC) para 27.
[32] *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 22 (Westlaw), cited with approval in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 32. See also *S v Basson* 2007 1 SACR 566 (CC) para 27.
[33] Meyerson (2015) *Criminal Justice Ethics* 69.
[34] Sward (1989) *Indiana Law Journal* 308.
[35] (1997) 118 CCC (3d) 353 (SCC) para 118 (Westlaw).

The Constitution 'confers extensive powers on the South African judiciary to uphold the rule of law. In so doing, it stipulates that courts must be independent and subject only to the Constitution and to the law, which judges must apply impartially and without fear, favour or prejudice.'[36] In South Africa's constitutional order, the judiciary is an independent pillar of the State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially.[37] Judicial impartiality is also implicit in the rule of law which is foundational to the Constitution.[38] Judicial impartiality is thus a principle at the forefront of the Constitution.[39] Judicial impartiality is also deeply embedded in the South African common law.[40]

In chapter four it was noted that when taking office, judicial officers swear or solemnly affirm to uphold and protect the Constitution and the human rights entrenched in it and to administer justice to all persons alike, without fear, favour or prejudice, in accordance with the Constitution and the law.[41]

It was also observed in chapter four that a presiding officer in a criminal trial not only acts as the trier of fact, but must also ensure, as far as is humanly possible, that a fair trial takes place.[42] This means firstly, that courts have a duty to ensure substantive fairness in an accused's trial, and secondly, courts have a duty to give substance to the notion of a fair trial.[43] A further implication of the duty resting on presiding officers to ensure that the accused's right to a fair trial is fulfilled, is that all the separate or discrete fair trial rights must be given meaning under the notion of a fair trial.[44] Although a principal and important consideration as regards a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.[45]

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[36] K O'Regan & E Cameron 'Judges, bias and recusal in South Africa' in HP Lee (ed) *Judiciaries in Comparative Perspective* (2011) 346 346.
[37] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 16.
[38] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 17.
[39] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 346.
[40] *Ibid* 346.
[41] See also, for example, Van der Westhuizen (2008) *AHRLJ* 257-258.
[42] See, for example, *S v Thebus and Another* 2003 2 SACR 319 (CC) para 106.
[43] *Ibid* para 106. See similarly, *S v Basson* 2007 1 SACR 566 (CC) para 112.
[44] *S v Thebus and Another* 2003 2 SACR 319 (CC) para 107.
[45] *Ibid* para 107.

6.2 The nature and content of judicial impartiality

> You shall not pervert justice. You shall not show partiality… - Deuteronomy 16:19.
>
> Partiality in judging is not good. - Proverbs 24:23.
>
> [E]ssential elements in a court are its independence and impartiality. Without these two qualities, a court is of no use to the community and will be rejected.[46]
>
> [I]t is a commonly shared opinion that justice is achieved only by processes which are perceived as fair and impartial…[47]

Judicial impartiality, as with judicial independence, is the 'the life blood of any judiciary worth anything at all.'[48] It is fundamental to the present study to establish what the essential characteristics are of judicial impartiality and what it connotes.[49]

It is perhaps necessary first to reiterate the distinction between judicial independence and impartiality. Besides essential institutional requirements or conditions such as security of tenure, judicial independence in essence relates to the 'absence of interference at an institutional level and at the level of decision-making by each judge.'[50] The Supreme Court of Canada has observed in this regard, as cited with approval by the Constitutional Court,[51] that: 'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision… The ability of individual judges to make decisions in discrete cases free from external interference or influence continues… to be an important and necessary component of the principle.'[52] This, according to the Constitutional Court, requires judicial officers to not only act independently, but

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[46] WZ Estey 'The changing role of the judiciary' (1985) 59 *Law Institute Journal* 1071 1071.
[47] Negri (2005) *International Criminal Law Review* 514.
[48] D Moseneke 'Current Developments: Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function' (2008) 24 *South African Journal on Human Rights* 341 350.
[49] In chapter four, the similarly required position of assessors is considered. See also *S v Jaipal* 2005 1 SACR 215 (CC) paras 37, 40, crisply affirming *inter alia* that: 'As members of the Court, assessors have to be as impartial as the Judge.'
[50] Moseneke (2008) *SAJHR* 350.
[51] *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 70; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19.
[52] *Beauregard v Canada* (1986) 26 CRR 59 paras 21-22 (Westlaw).

also impartially, and at an institutional level it requires structures to protect courts and judicial officers against external interference.[53] The independence of courts carries with it certain fundamental responsibilities: firstly, '[t]he judiciary must resist all attempts at interference, whether in the direct and corrupt form of bribes, or instructions or requests from the politically powerful, or favours from or for the financially powerful, or the much more difficult to detect, even in oneself, fear for rejection, or desire for popularity. Taken seriously, the constitutional imperative to act without fear, favour or prejudice may sometimes be more difficult to adhere to than at first glance appears. Judges are human, with human emotions, including fear and the need for acceptance.'[54]

Undue influence on a court may take a subtle form: judges 'may in some situations be so much part of a political, social or cultural system that there is no need for anyone to make a telephone call to tell them how to decide; they know what is expected in the circumstances; their moral and perhaps even intellectual dependence on the system demands them to act in a certain way. They may not realise that their independence is compromised and believe that they act fairly and even fearlessly. This might have been the case with many judges during the apartheid era.'[55]

Another responsibility related to judicial independence is for the judiciary to act with restraint.[56] This not only pertains to respect for the separation of powers, but also on how to handle ideological, political and social inclinations of judges.[57] In the latter respect, a former Justice of the Constitutional Court, Johann van der Westhuizen, explained in an extra-curial address that: 'In the previous century, the realists pointed out the undeniable significance of these factors; the critical legal studies movement developed it, and apartheid jurisprudence proved it. Judges have to be representative of and not out of touch with the community in which they operate, because the Constitution and law is there for people. Yet, they must be independent and act without fear, favour or prejudice.'[58] Van der Westhuizen opined that a practical approach would be to 'recognise that judges are human beings and

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[53] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19.
[54] Van der Westhuizen (2008) *AHRLJ* 259.
[55] *Ibid* 259.
[56] *Ibid* 260.
[57] *Ibid* 260.
[58] *Ibid* 260.

the products of their class, education and ideological and other preferences. Judges must then try to the best of their intellectual, moral and emotional ability to take decisions according to the Constitution and its values, and the law, as their oath of office demands from them.'[59]

In the present context, it has been argued in chapter four insofar as the role and function of the judicial officer in the South African accusatory trial are concerned, that judicial independence would connote that a trial court may not be influenced or swayed in its decision by pre-trial publicity or comments or opinions expressed in the media regarding a criminal case that is *sub judice*. A trial court should also not allow itself to be influenced by possible pressure that is brought to bear on it from any quarter of society as expressed in the media for a particular outcome. The court, as arbiter, is to act independently of such and base its decision purely on the merits of the trial.

Whereas judicial independence denotes 'complete decision-making liberty in individual cases',[60] or adjudicatory independence, and connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the executive branch of government,[61] as well as freedom from interference by any other external force, such as business or corporate interests or other pressure groups,[62] with the aim being 'judicial individualism' as it were,[63] judicial impartiality 'describes the required state of mind of a person who holds judicial office.'[64] To assess the impartiality of a court, the appropriate frame of reference is the 'state of mind' of the decision-maker.[65] Impartiality refers to the state of mind or attitude of the court in relation to the issues and the parties in the particular case, and it connotes in essence an absence of bias, actual or perceived.[66] Judicial independence is a structural or institutional requirement, whilst impartiality is

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[59] *Ibid* 261.

[60] *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 19*a*.

[61] *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw); *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 71; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19 n 22.

[62] *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*f*; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 72.

[63] See Steytler *Constitutional Criminal Procedure* 260-266, discussing also the institutional or structural requirements for judicial independence.

[64] Moseneke (2008) *SAJHR* 350.

[65] *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*d*.

[66] *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw); *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 71; *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*b-e*; *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 104 (Westlaw).

concerned with actual or perceived bias in respect of specific judicial officers.[67] In chapters three, four and five several principal or key constitutive elements of judicial impartiality were considered, particularly in the context of the South African adversarial or accusatorial system. Although these elements are trite and need no further elaboration, they may be restated as follows:

- The judicial officer is not a party in the case but must preside over and keep the scales even in the contest between the prosecution and the accused. Impartiality denotes equal treatment of the parties.
- Impartiality must be both subjectively present, with a non-partisan frame of mind, and objectively demonstrated to the informed and reasonable observer. The judicial officer must be subjectively free of prejudice or bias and he or she should be impartial from an objective viewpoint.
- The presiding judicial officer may not descend into the arena or enter the fray and take over the examination of witnesses and the questioning of the accused which are the primary tasks of the prosecutor and the defence.
- Impartiality presupposes a principally or relative passive adjudicator in adversarial process. A trial judge who actively injects him- or herself in the proceedings or the examination of evidence places his or her neutrality at risk: he or she may be seen as putting on the case for one of the parties, and is likely to have his or her vision clouded by the dust of the conflict, thereby depriving him- or herself of detached, calm and dispassionate observation or the ability to detachedly or objectively appreciate and adjudicate upon the issues being fought out before him or her by the litigants. An impartial hearing is one that is conducted with critical detachment.
- Judicial access to the police case docket, which is the prosecutor's brief, is strictly prohibited, and the arbiter ought to enter the trial *tabula rasa* as to the adjudicative facts in dispute or the evidence to be adduced at trial.
- Impartiality denotes a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions of counsel presented in court. Impartiality is the quality of open-minded readiness to persuasion - without unfitting adherence to

[67] Brickhill & Friedman 'Access to Courts' in *CLOSA* 59-76.

either party or to the judicial officer's own predilections, preconceptions and personal views.

- Impartiality on the part of the arbiter in the adversary system is the quality of keeping an open mind until judgment, reserving judgment that is until all relevant information has been presented by both parties in the case.
- Impartiality means a lack of prejudgment of the issues or a prior belief about the proper outcome of the case, and the ability to set aside any preconceptions or to adjust a prior belief on the basis of evidence.
- Impartiality can be defined as such an attitude of the arbiter that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided exclusively on the basis of the information brought out by the parties at trial - information that is legally relevant - and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin, or any other extraneous matter, such as pre-trial publicity or adverse findings implicating an accused as contained in a decision(s) given in parallel judicial proceedings arising from the same facts as the criminal case. A crucial element of impartiality, which a fair trial presupposes, is the accused's right to be tried solely on the evidence before court, and not on any information received outside that context.
- Impartiality in the adversary system means that the case will be decided on the basis of the issues determined and evidence adduced primarily by the parties because the adjudicator must remain relatively passive and not carry out independent truth-finding or pursue his or her own agenda.
- Impartiality entails the ability to see the case from two different sides.
- Impartiality is moreover displayed when the decision-maker bases his or her decision on predetermined normative premises, ie established rules, principles or precedents, which contribute to the drawing of lines between relevant and irrelevant factors, thereby reducing the risk of partiality.

Notwithstanding the fact that judicial impartiality and independence are separate and distinct values or requirements,[68] they are nonetheless interrelated principles: the combined tenor of these qualities which every judicial officer must possess is that a

[68] *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw); *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*b-f*; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) paras 71, 73.

trial judge must decide a case before him or her impartially, on the basis of the facts before court and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[69] The principles of independence and impartiality 'seek to achieve a twofold objective: first, to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute.'[70] Secondly, irrespective of any actual bias on the part of the court, the principles of independence and impartiality seek to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias.[71] B Beinart points out that '[f]airness and impartiality go hand-in-hand with the independence of the judiciary, not only in the sense of being free from the influence of personal gain and of personal or popular bias but from external direction or superior orders, from the politically and socially powerful, let alone from the dangers of corruption. This means, in modem times, independence especially from the legislature and the executive because of the power they wield in society.'[72] According to Beinart, both impartiality and independence, which are intrinsic to the rule of law, are secured not only by tradition, but also from the requirement that judges should have security of tenure and remuneration and be protected against arbitrary removal.[73] Of course, it has also been noted that impartiality and independence are guaranteed by the Constitution and the oath of office which all judicial officers are required to take. It is said that 'the legal aphorism that justice must be administered without fear, favour or prejudice, rests on the delicate balance between the two pillars; on the one hand, the independence of the judiciary as an institution from the other arms of government, and on the other, the requirement of impartiality of the judge in the adjudicatory process.'[74] Both the independence and impartiality of the adjudicator are *sine qua nons* and indeed are safeguards of

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[69] Van der Westhuizen (2008) *AHRLJ* 258.
[70] *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 17*h*.
[71] *Ibid* 17*h*-18*a*.
[72] Beinart (1962) *Acta Juridica* 114 (footnote omitted).
[73] *Ibid* 114.
[74] C Okpaluba 'Institutional independence and the constitutionality of legislation establishing lower courts and tribunals: Part I' (2003) 28 *Journal for Juridical Science* 109 127.

procedural due process or a fair trial.[75] It is meaningless to talk about the right to a fair hearing in circumstances where a hearing has been conducted by a court in an atmosphere devoid of utter judicial independence on the part of the court and impartiality of the adjudicating officer.[76] The right to a fair hearing in criminal trials, as in civil proceedings, cannot be based other than upon the fundamental premise that the hearing be held or the trial conducted by an independent and impartial court.[77] Judicial independence is seen as 'the necessary precondition to impartiality', as 'a *sine qua non* for attaining the objective of impartiality';[78] improper interference threatens impartiality. 'Both concepts are essential to a proper discharge of judicial functions.'[79] Both concepts also legitimate the judicial role: 'Independence and impartiality, as expressed in court decisions, in the processes by which judges arrive at decisions, and in judges' individual behaviour, underpin public confidence in the legitimacy of the judiciary and thus strengthen democracy as a whole.'[80]

Judicial impartiality does not denote 'colourless neutrality'.[81] Indeed, the Constitutional Court has made clear that absolute neutrality 'is something of a chimera in the judicial context.'[82] This is because judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties.[83] A Justice of the Constitutional Court, Edwin Cameron, in an extra-curial paper, notes that 'judges do not enter public office as ideological virgins. They

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[75] This is implicit in section 35(3)(*c*) of the Constitution - which provides that the accused's right to a fair trial includes a public trial before an 'ordinary court' - read with section 165(2) of the Constitution, which provides as follows: 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

See also, for example, MH Redish & LC Marshall 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 *The Yale Law Journal* 455, arguing that the values of due process or a fair trial cannot be realised without the core element of an independent adjudicator, and that an independent adjudicator is also pivotal to the attainment of the appearance of justice.

[76] Okpaluba (2003) *Journal for Juridical Science* 110-111.

[77] *Ibid* 111.

[78] *Ibid* 128.

[79] *Ibid* 128.

[80] A Gordon & D Bruce 'Transformation and the Independence of the Judiciary in South Africa' (2007) The Centre for the Study of Violence and Reconciliation 10 <http://www.csvr.org.za/docs/transition/3.pdf>. See also, for example, MH Hoeflich & JG Deutsch 'Judicial Legitimacy and the Disinterested Judge' (1978) 6 *Hofstra Law Review* 749 750, 751; Van der Westhuizen (2008) *AHRLJ* 259-260.

[81] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13.

[82] *Ibid* para 13. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 42, holding that: 'Absolute neutrality on the part of a judicial officer can hardly if ever be achieved.'

[83] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13.

ascend the Bench with a built-in and often strongly-held set of values, preconceptions, opinions and prejudices. These are inevitably expressed in the decisions they give, constituting "inarticulate premises" in the process of judicial reasoning.'[84] Judicial recognition of the fact that a judicial appointee cannot on becoming a judge be expected to divest him- or herself of those views,[85] constitutes an admission of what to outsiders will seem obvious.[86] It is appropriate for judicial officers to bring their own life experience to the adjudication process.[87] The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes.[88]

In a multilingual, multiracial and multicultural society, judicial officers 'will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench.'[89] In a multilingual, multiracial and multicultural country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them.[90] 'The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.'[91]

The duty to be impartial does not mean that the judicial officer '"does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are

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[84] Cameron (1990) *SAJHR* 258.
[85] See *R v Milne and Erleigh (6)* 1951 1 SA 1 (A) 12.
[86] Cameron (1990) *SAJHR* 258.
[87] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 42.
[88] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 119 (Westlaw).
[89] *Ibid* para 38 (Westlaw), cited with approval in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 42 ('*Sarfu*').
[90] *Sarfu* supra para 43.
[91] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 38 (Westlaw).

free to carry, untested, to the grave."'[92] True impartiality does not require that the judge have no sympathies or opinions; what it does require is that the judge '"*nevertheless be free to entertain and act upon different points of view with an open mind*."'[93] It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear.[94] 'Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. *It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations*.'[95]

The Supreme Court of Canada has observed that it is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. In general, the trier of fact is entitled to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to his or her findings of fact. At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, 'judges must make those determinations *only after being equally open to, and considering the views of, all parties before them*. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.'[96] It is submitted that these principles in judging would apply equally in respect of impartial adjudication in South Africa's legal system.

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[92] *Ibid* para 119 (Westlaw).
[93] *Ibid* para 119 (Westlaw) (my emphasis).
[94] *Ibid* para 119 (Westlaw).
[95] *Ibid* para 120 (Westlaw) (my emphasis).
[96] *Ibid* paras 39-40 (Westlaw) (my emphasis).

It must be clear from the afore-going that the impartiality required of all judges does not mean the absence of personal convictions and an underlying worldview or philosophy of life.[97] As a notable Justice of the United States Supreme Court observed, each of us possess an innate 'stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs'.[98] 'In this mental background every problem finds its setting.'[99] We may try to see things as objectively as we can; nonetheless, 'we can never see them with any eyes except our own.'[100] Moreover, '[d]eep below the consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.'[101]

The famous legal realist, Judge Jerome Frank, pointed out that impartiality does not entail the total absence of preconceptions in the mind of the judge, for if that were the case no one would ever have had a fair trial and no one ever would.[102] Frank explained that:[103]

> The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired "slants," pre-conceptions, life could not go on. Every habit constitutes a prejudgment; were those prejudgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. "To live is to have a vocation, and to have a vocation is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and to have a point of view is to have a prejudice or bias…" An "open mind," in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless

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[97] *Ibid* paras 34-35 (Westlaw).
[98] BN Cardozo *The Nature of the Judicial Process* (1921) 12 (footnote omitted).
[99] *Ibid* 13.
[100] *Ibid* 13.
[101] *Ibid* 167.
[102] *In re JP Linahan* 138 F.2d 650 651 (1943).
[103] *Ibid* 651-652 (footnotes omitted).

> human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social preconceptions, the "value judgments" which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed "the valuation system of the law." The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

What judicial impartiality would require, and indeed presupposes, is for the judicial officer to lay aside 'any irrelevant personal beliefs or predispositions', in the adjudication of the case before court - to approach the case with a mind open to persuasion by the evidence and the submissions of counsel.[104] It would require the judge to carry out his or her oath of administering justice without fear, favour or prejudice.[105] It is the '*unfitting* adherence' to the judge's own predilections, preconceptions and personal views, which the imperative of impartiality in judging precludes.[106] In other words, to maintain such predilections, preconceptions and personal beliefs, when such do not accord with the evidence, is inconsistent with an impartial mind in adjudication.

In sum, impartiality in the judicial process requires of the presiding officer to treat the parties equally, giving them an equal opportunity during the trial. The judicial officer must not have any personal interest, however remote, in the outcome of the case. He or she must give the parties an opportunity to air their arguments. The judicial discretion must be based on the evidence that comes before the judge. The judge's decision must be reasoned.[107]

6.3 The character of judicial bias

The Constitutional Court has held that '[a] cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and

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[104] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48.
[105] *Ibid* para 48.
[106] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13 (my emphasis).
[107] A Barak *Judicial Discretion* (1989) 22.

other tribunals', and that '[n]othing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'[108] Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking: 'the judge was biased'.[109]

It has been seen in chapters three, four and five the essential nature of judicial bias under an adversarial model of proceeding. It was observed that if the presiding judicial officer in an adversarial trial were to take a substantial role in evidence-gathering, his or her activity would translate as help offered to one side in the contest, that is, as prejudice or bias. If a judge in a criminal matter were to be in control of or responsible for leading the evidence, ie for the fact-finding process, it would be difficult for the judge to be completely unprejudiced against the accused, when he or she effectively has to be both prosecutor and judge at the same time. Even though the judge in the latter inquisitorial type of system would also be required to look for circumstances in the accused's favour, one would still have the position that in the eyes of the accused, the judge is not wholly impartial, but is rather associated with the State prosecuting authorities, of which he or she is seen to be merely a representative (the judicial officer would be perceived as being a second prosecutor); the judge would be regarded by the accused as his or her opponent.[110] The presiding officer in the accusatory trial must refrain from questioning witnesses or the accused, or from intervening in a party's presentation or conducting of his or her case, in a way that conveys or is likely to convey that he or she is not bringing an open and impartial mind to the adjudication of the case.

The trite position was also noted that in the main (certainly as recognised in the case-law), bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues or the merits of the case.[111] Bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does

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[108] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 35.
[109] *De Lille and Another v Speaker of the National Assembly* 1998 7 BCLR 916 (C) para 17.
[110] Snyman (1975) *CILSA* 108. See also *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) paras 54-55.
[111] See also Redish & Marshall (1986) *The Yale Law Journal* 502, stating that '[t]here can certainly be no bias more pervasive than a predisposition to the exact issues - factual or legal - before the court.'

not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. Bias, then, is a state of mind that is not open to persuasion by the evidence and the submissions of counsel presented at trial.[112] Bias, in other words, is clearly manifest when the judge not only has a prior belief about the proper outcome of the case but also holds the belief unshakably – that is, refuses to update it on the basis of evidence.[113] The latter aspect is also expressed in the concept of 'partiality' which in the judicial context refers to a presiding officer who has certain preconceived biases and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.[114] In demonstrating partiality, it must be shown that any beliefs, opinions or biases held by the decision-maker prevent him or her '*from setting aside any preconceptions and coming to a decision on the basis of the evidence*'.[115]

Where the decision-maker prejudges the issues in a particular case, this amounts to impugnable bias.[116] It is not bias *per se* to hold certain tentative views about a matter. It is human nature to have certain *prima facie* views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and prejudgment of the issues to be decided, on the other. Bias or partiality occurs when the court approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No-one can fairly decide a case before him or her if he or she has already prejudged it. Thus, prejudgment of the issues to be decided (which is in a sense prejudice) constitutes bias. The entire proceedings become tainted with bias.[117]

In the present context, then, bias would connote a judicial officer being consciously or unconsciously influenced or affected by adverse pre-trial publicity

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[112] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21; *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 105-107 (Westlaw).
[113] Posner (1999) *Stanford Law Review* 1514-1515.
[114] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 107 (Westlaw).
[115] *Ibid* para 107 (Westlaw) (my emphasis).
[116] G Devenish 'Disqualifying bias. The second principle of natural justice - the rule against partiality or bias (*nemo iudex in propria causa*)' (2000) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 397 402, 403-404.
[117] *De Lille and Another v Speaker of the National Assembly* 1998 7 BCLR 916 (C) para 17.

which predisposes him or her to convict the accused or to make a determination regarding the merits of the case before any evidence is led or to prejudge the guilt of the accused. Bias would carry the additional component of an inability on the part of the presiding officer to lay aside prejudices, personal beliefs, preconceptions or preconceived ideas, and predispositions that he or she may harbour regarding the accused and/or the merits of the case, that may be occasioned by pre-trial publicity, a bias which would not leave his or her mind perfectly open to conviction or to persuasion by the evidence and the submissions of counsel brought out during the course of the adjudication. Clear bias or prejudice would be present where the presiding officer bases his or her decision on media publicity surrounding the case rather than on the evidence adduced and tested at trial. After all, as has been noted, a trial is not fair when an accused is not tried solely on the evidence before court, but on information received outside that context.[118] Disqualifying bias is that which stems from an extra-judicial source and results in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case.[119]

There are of course other forms of judicial bias such as a pecuniary interest or some other personal interest in the outcome of a case, or social or racial or gender-based bias, but these do not need to be amplified for present purposes.

Some would argue that perfect judicial impartiality does not exist or is an elusive ideal particularly because judges may take mental shortcuts in their decision-making by acting on a range of subconscious or cognitive biases (heuristics).[120] In chapters one and three, mention was made of some of these cognitive biases, and in particular the pertinent danger of confirmation bias was considered where the presiding officer may form an early hypothesis of a case on account of material knowledge gained of the merits of the matter before trial, and who may then assimilate selectively evidence presented at trial which confirms rather than contradicts the prior belief regarding the case. As stated in chapter three, Willem Gravett, writing from a South African perspective, provides an analysis of such cognitive biases and heuristics, or unconscious intuitive thought processes, that may undermine deliberative decision-making which is required in the judicial process.[121]

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[118] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 31D; Snyman *Criminal Law* 321.
[119] *United States v Grinnell Corp.* 384 US 563 583 (1966).
[120] Geyh (2013) *Florida Law Review* 510.
[121] Gravett (2017) *SALJ* 53. Gravett surveys various leading authorities on the subject. A prominent work on heuristics and related biases is D Kahneman *Thinking, Fast and Slow* (2011).

The writer also suggests the steps that can be taken by judicial officers to avoid, or at least minimise, the effects of cognitive biases. These include the important discipline of writing a judgment which may enable judges 'to overcome their intuitive, impressionistic reactions. The process of writing might challenge judges to assess a decision more carefully, logically, and deductively.'[122]

Vicki Waye,[123] commenting on a landmark empirical study exploring the influence of cognitive biases or illusions on judicial decision-making,[124] suggests that necessary qualifications have to be made when transplanting experimental responses to real-life situations and that the empirical study may not have been accurate in its portrayal of the thought processes used by judges.[125] This is by reason of the fact that judges would be required to provide reasons for their decisions, and the requirement of written reasoning encourages a more normative means of evaluation; it 'encourages rational decision-making in both the traditional and more normative senses because it allows depth of review, recourse to decisional tools and other forms of reality testing absent from the quick brain teasing exercises outlined in the behavioral science experiments.'[126] The requirement of written reasons would also help to guard against irrelevant or otherwise inadmissible material being taken into account.[127] Moreover, legal training may enable the judge to disregard irrelevant and/or inadmissible evidence: judicial legal training would include examination of the rationale for the evidential requirement of relevance and for the evidentiary rules of exclusion. For example, through this understanding, judges may be better placed to discount hearsay because the dangers of hearsay evidence, such as distortion and confabulation, would have been the subject of critical examination in their legal education.[128] Waye also remarks that 'the behavioural science experiments were presented as neatly packaged problems where the intermediate facts underlying the ultimate findings that the judges were required to make were presented definitively, *rather than as items of evidence subject to the rigour of adversarial examination and rebuttal by way of contrary*

[122] Gravett (2017) *SALJ* 76. See also Guthrie, Rachlinski & Wistrich (2007) *Cornell Law Review* 36-37, arguing that by stating reasons for a decision before the ruling is announced may encourage the judge to be more deliberative.
[123] At the time of writing, Waye was a Senior Lecturer, Faculty of Law, The University of Adelaide.
[124] Guthrie, Rachlinski & Wistrich (2001) *Cornell Law Review* 777.
[125] Waye (2003) *Melbourne University Law Review* 441.
[126] *Ibid* 441.
[127] *Ibid* 441.
[128] *Ibid* 441.

evidence. *The judges subject to these experiments lacked the benefit of hearing divergent views, of testing the evidence, and of access to other evidence and base rate information which they would normally enjoy. In this respect, the experiments were designed to elicit error*. Given the many differences between the manner in which facts are presented at trial, it would be wrong to assume that performance on one type of problem will be the same for another type of problem. Actual reasoning processes are content-bound or schema-bound.'[129] Experience gained by the judicial officer from presiding in similar cases and recourse to precedent and the use of model decision-making formats and rules of assessing evidence, would generally also help to combat error in the decision-making process.[130]

Judges in trial matters would generally tend to analyse and evaluate or weigh evidence against a narrative view of the case as a whole.[131] Such an approach to decision-making, 'organises, interprets and evaluates evidence against a narrative construction of the events supplied by the parties and from the knowledge and experience of the decision-maker.'[132] Judges may construct a number of stories about an event and will accept one story as the best when it accounts for the evidence presented at trial and is the most coherent in the sense of being internally consistent, probable and complete. Confidence in a particular version is increased where the story appears to be the only explanation of the evidence, after the judge has assigned probative weight to the evidence and had regard to the probabilities emerging from the case as a whole.[133] In general, this has been my experience as a prosecutor with the judicial process in decision-making.

Nonetheless, while it is difficult to transpose experimental data to real-life decision-making, judges will from time to time be imperfect arbiters.[134] This does not necessarily mean, however, that judicial officers are likely to be affected by cognitive biases or illusions on a routine basis.[135] Waye correctly observes that '[t]rial judges use techniques that avoid irrational decision-making. These include recourse to decisional tools such as precedent, reliance upon rules of proof that direct the judge to be cautious of unreliable evidence, the use of written reasons which direct the

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[129] *Ibid* 442 (footnote omitted) (my emphasis).
[130] *Ibid* 442.
[131] *Ibid* 443.
[132] *Ibid* 443-444.
[133] *Ibid* 444.
[134] *Ibid* 446.
[135] *Ibid* 447.

judge to articulate and to examine critically the inferences underlying their conclusions of fact and, lastly, a sense of their own role in the criminal justice system. Judicial recognition of the scope of their mandate to deliver judgment according to law, while recognising that law is not a collection of immutable rules, is an acknowledged restraint upon both the fact-finding function and upon the manner in which legal rules are interpreted and applied to established facts. Judges' decisions are also subject to appeal and, where written reasons are required, appellate review is likely to be more thorough than in lay decision-making, where no such transparency applies.'[136]

A reasoned verdict may at times be an imperfect check on the role of the unconscious in judicial decision-making.[137] This is because reasons for a decision may be justificatory rather than exploratory, distorted by confirmation bias, which, as has been seen, is 'the well-documented tendency, once one has made up one's mind, to search harder for evidence that confirms rather than contradicts one's initial judgment.'[138] Published reasons for a decision may conceal the true reasons for a judicial decision by leaving them buried in the judicial unconscious.[139] A reasoned verdict would, however, have the value of aiding in catching errors that are inevitable in intuitive reasoning about complex issues and to flag any gap between the outcome of the case and the capacity of a legalist analysis or method of evaluating evidence and precedent to generate it.[140]

One cannot deny the human element in the judicial process, with the personal idiosyncrasies, traits, dispositions, ideology, habits, sympathies and antipathies of the judge, and the inarticulate premises, intuition, the subconscious or subliminal forces or underlying prejudices, biases and preferences that may be at work in or influence or shape decision-making particularly where the exercise of discretion and value judgments are involved; judges are not automatons and the judge's determination of the facts and very often the determination of what the law is are not mechanical acts.[141] John Dugard states that: 'As long as the judicial function is entrusted to men, not automatons, *subconscious prejudices and preferences will*

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[136] *Ibid* 447.
[137] RA Posner *How Judges Think* (2008) 110.
[138] *Ibid* 110-111.
[139] *Ibid* 111.
[140] *Ibid* 111.
[141] *Ibid* 69-70, 93-121; Frank *Law and the Modern Mind* 108-158; J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *The South African Law Journal* 181 187-195.

never be completely removed from the judicial process… [T]he role played by the inarticulate premiss in the judicial process cannot be refuted.'[142] Judge Jerome Frank, in an extra-curial work, sought to show that, as he put it, efforts to eliminate the personality of the judge from the judicial process 'are doomed to failure.'[143]

What would be required on the part of judicial officers to ensure impartial, just and prudent decision-making according to law, is greater introspection to recognise the necessary existence of the personal element and to act accordingly.[144] In the words of Frank: 'The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice.'[145] A judge who is aware of his or her own weaknesses and prejudices will be better able to master them or *nullify their effect*.[146] The inarticulate premises or subliminal forces flourish when their existence is denied or concealed.[147] '"The less a mind is given to introspection the more it is the victim of the illusion that it knows itself thoroughly."'[148] In *In re JP Linahan*, Judge Frank eloquently held in this regard:[149]

> *The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect*. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; *the sunlight of awareness has an antiseptic effect on prejudices*. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases… His findings of fact may be erroneous, for, being human, he is not infallible; indeed, a judge who purports to be superhuman is likely to be dominated by improper prejudices.

It is apparent that these principles enunciated by Judge Frank relating to the need for judicial self-awareness would apply equally to the position of any bias in the judicial mind that may be occasioned by prejudicial pre-trial publicity.

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[142] Dugard (1971) *SALJ* 187-188 (my emphasis).
[143] Frank *Law and the Modern Mind* 148.
[144] *Ibid* 148.
[145] *Ibid* 148.
[146] See also Gravett (2017) *SALJ* 78, suggesting that an effective way to enhance deliberative decision-making would be to facilitate judges' understanding of possible reliance on heuristics and the power of cognitive biases; '[j]udges could learn to interrupt their intuition, thereby allowing deliberation to intervene and modify behaviour, if not actually altering subconscious prejudices and attitudes.'
[147] Dugard (1971) *SALJ* 188-189.
[148] Frank *Law and the Modern Mind* 126.
[149] 138 F.2d 650 652-654 (1943) (footnotes omitted) (my emphasis).

It is submitted, all the same, that cognitive biases or illusions that undermine proper rationality that is required in decision-making are cognitive reasoning errors that do not constitute impugnable bias which gives rise to a want of judicial impartiality. Judge Grant Hammond,[150] writing extra-judicially and in dealing with what is meant by impartiality and in that respect what bias denotes which undermines it, makes the following pertinent observation:[151]

> [J]udges are prone to human fallibility and everyday heuristic biases, or skewed modes of thinking. These include, but are not limited to, such cognitive errors as hindsight bias (attaching higher probabilities to events after they have happened); availability bias (which causes us to base decisions on information that is more readily available in our memories, rather than the data we 'really' need); confirmation bias (which inclines us to look for confirming evidence of an initial hypothesis, rather than falsifying evidence that would disprove it); and apathetic bias (which inclines us to abdicate individual responsibility when in a crowd). *It is not these sort of cognitive reasoning errors with which we are concerned here*. They are part of the stuff of 'regular' appeals and *go to showing that a judge or a court's actual reasoning process was wrong*.

According to Hammond, what we would be looking for in respect of the type of bias which negates judicial impartiality, 'is something that inappropriately affects the reasoning process in that it has nothing, or very little, to do with the actual merits of the case, but is somehow brought into play in the determination of it, whether consciously or unconsciously. A failure to avoid this sort of error is said by the law to amount to a want of impartiality.'[152] Hammond goes on to identify certain broad categories of the latter form of impugnable bias, namely:[153]

- disqualification by interest, where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment;
- disqualification by conduct, including published statements, either in the course of, or outside, the proceedings;
- disqualification by association, where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings;

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[150] At the time of writing, Hammond was a judge of the Court of Appeal of New Zealand.
[151] G Hammond *Judicial Recusal: Principles, Process and Problems* (2009) 33 (my emphasis).
[152] *Ibid* 33.
[153] *Ibid* 42.

- *disqualification by extraneous information, where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias. There should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her*;
- a judge should not decide a case on purely personal considerations;
- *a judge must be in a position to consider all potentially relevant arguments*;
- there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.

Willem Gravett similarly alludes to the distinction between cognitive biases and a bias which disqualifies a judge from presiding in a case, where he states as follows:[154]

> For judges it is a matter of professional identity to be, and to be seen to be, impartial arbiters of the disputes that society present to them for resolution. Few would disagree that most South African judges attempt to reach their decisions utilising facts, evidence, and highly constrained legal criteria, while setting aside conscious personal biases, attitudes, and emotions. However, even if judges have no conscious bias or prejudice against either litigant, fully understand the relevant law, and know all the relevant facts, they might still make systematically *erroneous decisions* under certain circumstances because of how they - like all human beings - think.

It is also submitted that there is a distinction between 'a general attitude or ideology' on the part of a judicial officer, on the one hand, and a personal (or 'individual-to-individual') bias that disqualifies, on the other.[155] This recognises the fact, as has been noted, that 'the law is not administered by a non-personal being without emotion and prejudice.'[156] A judicial decision is a decision by a human being called a judge.[157] The judge, as a human being, is shaped by his or her background and environment.[158] It has been seen that among those influences which affect judicial decisions are the judge's education and associations, his or her political and economic and social philosophy, and his or her economic and social status.[159] 'The

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[154] Gravett (2017) *SALJ* 75 (my emphasis). See also Peer & Gamliel (2013) *Court Review* 114.
[155] R Slovenko '"Je Recuse!": The Disqualification of a Judge' (1959) 19 *Louisiana Law Review* 644 648.
[156] *Ibid* 647.
[157] *Ibid* 644.
[158] *Ibid* 644.
[159] *Ibid* 644-645.

act of becoming a judge does not convert a person into an individual without emotion and prejudice. Human motives and mental processes are not transformed when one assumes the judicial function.'[160] Unlike the case of personal bias, a judge without an ideology, explicit or implicit, is non-existent.[161] Every person, whether he or she admits it or not, has a philosophy of life.[162] Personal bias, however, 'may be the result of a pecuniary interest in the outcome of the trial, an individual antagonism, a relationship to one of the parties, or a corrupt conspiracy.'[163] The reason that personal bias is a ground for disqualification, whereas a general attitude or ideology is not or cannot be, 'is that personal bias *cannot be overcome by evidence at the trial, no matter how persuasive, because the bias is purely capricious and fortuitous and has no relation to the merits of the issues*. *There is the possibility, on the other hand, of overcoming or changing a previous attitude or ideology by evidence*.'[164]

Furthermore, intuitive reasoning in judicial decision-making is not necessarily prejudicial.[165] Take for example the question of whether a particular version presented at trial is probable or improbable. To answer that question, the judicial officer would be engaging his or her general knowledge, common sense, beliefs, ideas, education or experience. There is, then, a sense in which judicial deliberation may be embedded in intuition.[166] Through intuition, the presiding officer is able to gain a perception or understanding of the case or to adequately characterise the matter.[167] Such perception of the case is 'intuition-laden'.[168] The initial perception of the case must then be checked against the deliberative process involving questions as to the applicable law and its proper interpretation, questions about the facts of the case and about the proper assessment of the case against institutional values.[169] Excellence in deliberation is said to be achieved 'when the interests "for who, where, when, by which, why and how" are optimally met.'[170] Intuitive reasoning is also engaged where the judge 'sees' whether the decision leads to a right judgment: in

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[160] *Ibid* 645.
[161] *Ibid* 648.
[162] *Ibid* 648.
[163] *Ibid* 648.
[164] *Ibid* 648 (footnote omitted) (my emphasis).
[165] Posner *How Judges Think* 107 *et seq*, noting even that besides facilitating a speedier decision, intuition may enable a more accurate decision than analytical reasoning would.
[166] Soeharno *The Integrity of the Judge* 74.
[167] *Ibid* 57-58.
[168] *Ibid* 74.
[169] *Ibid* 74.
[170] *Ibid* 59.

the end, the judge must be able to 'see' for him- or herself whether a decision adequately meets the specific demands of the concrete situation of the case before him or her or whether it should be reconsidered.[171] 'This "final" knowledge cannot be reached by mere syllogism. It is rather the conviction of the individual judge, wherein the complex of his knowledge and emotions, of the emotions and interests in the community, of the nature of the case and other factors, is recognized.'[172] These considerations would seem to resonate with the following remarks by Cameron JA (as he then was) in *S v Mavinini*, in defining the standard of proof beyond a reasonable doubt in a criminal case:[173]

> It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials, *it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty*. It comes down to this: *even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction - in our case, the rules of evidence interpreted within the precepts of the Bill of Rights - remains intact*. Differently put, subjective moral satisfaction of guilt is not enough: it must be *subjective satisfaction attained through proper application of the rules of the system*.

It is also a truism that 'the judicial process cannot operate in an ethical vacuum.'[174] After all, concepts like 'good faith', 'unconscionable' or 'reasonable' import value judgments into the daily grind of courts of law.[175] It would be foolish to deny that the judicial process calls for value judgments in which extra-legal considerations may loom large.[176] Of course, the starting point, framework and the outcome in the judicial process must still be legal.[177]

6.4 The right of recusal

The recusation of a presiding judicial officer (*recusatio judicis suspecti* or *exceptio judicis suspecti*) is a remedy which enables, and may require, a judicial officer who has been appointed to hear and determine a case to stand down from the case and

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171 *Ibid* 60, 74.
172 *Ibid* 60.
173 2009 1 SACR 523 (SCA) para 26 (footnote omitted) (my emphasis).
174 *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 207, per Kriegler J.
175 *Ibid* para 207.
176 *Ibid* para 207.
177 *Ibid* para 207.

leave the disposition of the matter to another colleague.[178] In relation to criminal cases, the recusal remedy is designed to ensure that a person accused before a court of law should have a fair trial.[179] A person should not be tried by a court concerning which there is a reasonable apprehension of bias, and where such a reasonable apprehension exists, the person concerned is entitled to have the court recuse itself.[180] This may be referred to as 'the recusal right' or right of recusal.[181] The application for recusal may be brought by the accused or the prosecution, or the court may recuse itself *mero motu*, ie without there having been any prior application.[182]

The right of recusal can be traced back to Roman Law, in particular the *Codex* of Justinian, where it is stated:[183]

> It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being so recused, the parties have to resort to chosen arbitrators, before whom they assert their rights. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined, so that the cause go to another; the right to recuse having been held out to him; since we have already provided that after joining issue no appeal can be taken before final judgment, nor recusation be had, lest suits be prolonged without end.

The right of recusal is deeply entrenched in the South African common law.[184]

As in many Commonwealth countries, it is generally accepted that there are two circumstances in which a judicial officer must recuse him- or herself: 'The first is where the judge is actually biased or has a clear conflict of interest, and the second

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[178] Hammond *Judicial Recusal* 3.

[179] *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 3 SA 482 (A) 491E-F. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 28; *Basson v Hugo and Others* 2018 3 SA 46 (SCA) para 23.

[180] *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 3 SA 482 (A) 491D, referring to the test for recusal being a 'likelihood of bias' or 'reasonable suspicion of bias', which was subsequently clarified by the Constitutional Court to be a reasonable 'apprehension of bias' - *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 38, 48. See also *S v Basson* 2007 1 SACR 566 (CC) para 29.

[181] *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 3 SA 482 (A) 491D.

[182] *Ibid* 491D-E.

[183] See, for example, H Putnam 'Recusation' (1923) 9 *The Cornell Law Quarterly* 1 3 n 10; Slovenko (1959) *Louisiana Law Review* 649-650 – with reference to the *Codex* of Justinian 3.1.16.

[184] See *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 4 SA 808 (T) 810H-813H (tracing the history of the right of recusal from Roman times to modern South African law); *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 3 SA 673 (A) 688E-689E; Nathan *The Common Law of South Africa* 1996-2001 (paras 1992-1995).

is where a reasonable person, in possession of the facts, would harbor a reasonable apprehension that the judge is biased.'[185]

When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias.[186] Actual bias need not be established.[187] This is because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.[188] The reasonable apprehension of bias test is in line with the maxim that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[189]

The Constitutional Court has laid down the principle that the correct approach to an application for recusal, ie the test for apprehended bias, is '*objective*' and the onus of establishing it rests upon the applicant.[190] The Court pointed out that the question in such an application 'is whether a *reasonable, objective and informed* person would on the *correct facts reasonably* apprehend that the Judge has not or *will not* bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'[191] The test for recusal has also been stated by the Court as 'whether there is a reasonable apprehension of bias in the mind of a reasonable litigant *in possession of all the relevant facts*, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.'[192]

The right of recusal, then, '*requires an objective scrutiny of the evidence*.'[193] The test to be applied involves the legal fiction of the reasonable person - 'someone endowed with ordinary intelligence, knowledge and common sense.'[194] The notion of the reasonable person '*cannot vary according to the individual idiosyncrasies or*

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185 O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 347.
186 *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 109 (Westlaw), as endorsed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 38.
187 *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 109 (Westlaw).
188 *Ibid* para 109 (Westlaw).
189 *Ibid* para 110 (Westlaw).
190 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 45, 48 (my emphasis).
191 *Ibid* para 48 (my emphasis).
192 *Bernert v ABSA Bank Ltd* 2011 3 SA 92 (CC) para 29 (my emphasis).
193 *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 3 SA 673 (A) 695C.
194 *Ibid* 695C.

the superstitions or the intelligence of particular litigants.'[195] An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for an application for recusal.[196] The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.[197] It follows that incorrect facts which are taken into account by an applicant must be ignored in applying the test.[198] A challenge based on inaccurate information cannot succeed.[199]

It is also clear that there is a 'double reasonableness requirement' which the application of the test for recusal imports.[200] This means that: 'Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.'[201] This two-fold emphasis serves to underscore the weight of the burden resting on a person alleging judicial bias or its appearance, namely that the threshold for establishing apprehended bias is high.[202] The double reasonableness requirement 'also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.'[203] Unreasonable or ill-founded apprehensions will not be entertained, and it is wrong to yield to a tenuous or frivolous objection.[204] An apprehension of bias must be based on reasonable grounds.[205] The Constitutional Court has noted in this context that the legal standard of reasonableness is that expected of a person in the circumstances

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[195] *Ibid* 695D (my emphasis).
[196] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 45.
[197] *Ibid* para 45.
[198] *Ibid* para 45.
[199] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 353.
[200] *Ibid* 354; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 14 ('*Saccawu*').
[201] *Ibid*.
[202] *Ibid* 354, *Saccawu* supra para 15; *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 113 (Westlaw).
[203] *Saccawu* supra para 16.
[204] *Ibid* paras 15, 17.
[205] *Ibid* para 14.

of the individual whose conduct is being judged.[206] A court, then, 'must determine that objectively a reasonable litigant would entertain an apprehension that on the facts is reasonable. A subjective anxiety on the part of a litigant, even if genuine, will not suffice for recusal if it is not grounded on facts sufficient to give rise to a reasonable apprehension of bias in the mind of a reasonable litigant.'[207]

It must be stressed that there are two important considerations or aspects that are built into the test for recusal, as emphasised by the Constitutional Court.[208] In other words, these considerations must be taken into account in deciding whether a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. The first consideration is that as a starting point the court 'presumes that judicial officers are impartial in adjudicating disputes.'[209] 'Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. *This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence*.'[210] The reasonableness of an apprehension of bias must therefore be assessed in the light of the oath of office taken by judicial officers to administer justice without fear, favour or prejudice, '*and their ability to carry out that oath by reason of their training and experience*. *It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions*.'[211] This in-built aspect entails two further consequences: 'On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. *On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted*.'[212]

The second in-built aspect of the test for recusal that must be considered, is the chimera of absolute or 'colourless' neutrality (looked at above):[213] 'It has long been recognised that no judge can be absolutely neutral. *Judges are unavoidably*

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[206] *Ibid* para 17.
[207] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 354.
[208] *Saccawu* supra para 12.
[209] *Ibid* para 12; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 40-41 ('*Sarfu*').
[210] *Sarfu* supra para 40 (my emphasis).
[211] *Ibid* para 48 (my emphasis). See also O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 352.
[212] *Saccawu* supra para 12 (my emphasis). See also O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 352.
[213] *Saccawu* supra para 13; *Sarfu* supra paras 42-44.

influenced by the society in which they live.'[214] Judges as human beings bring to their work their life experience which means that they are not neutral in an absolute sense; '*it is not improper for judges to have individual perspectives and for these to be brought to bear on their adjudication of cases*.'[215] The difference between prior knowledge and prejudice has been stated as follows:[216]

> *None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand*. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, *but not the mind as a sieve without prior reference points and commitments*. We want judges and juries *to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration*.

Writing extra-judicially, Justices of the Constitutional Court, Kate O'Regan and Edwin Cameron, pertinently comment in this respect:[217]

> Thus understood, impartiality is a habit of mind and a professional duty that needs to be cultivated: *a habit of not insisting on seeing what we expect to see, but rather seeking to see things afresh*. In applying the recusal test, therefore, a court *must accept that judges are not 'colourlessly neutral' but have life experiences that influence their perspective*. *The open mind that judicial impartiality requires calls upon judges to be aware of their own predilections as far as is possible and to listen to evidence and argument open to the possibility of being persuaded by either side*.

True impartiality does not require that a judge have no opinions or perspectives, but it does require him or her to be free to entertain and act upon different points of view with an open mind fair to all parties.[218] It is submitted that it can thus be said that in the context of adverse or prejudicial pre-trial publicity, judicial impartiality would not require the presiding officer to artificially empty his or her mind of such publicity (one cannot really unbite the apple of knowledge), but to lay the publicity aside and to listen to the evidence and argument presented at trial, open to the possibility of being persuaded by either party in the case. It would be a case of seeing the matter afresh

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[214] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 351 (my emphasis).
[215] *S v Basson* 2007 1 SACR 566 (CC) para 30 (my emphasis).
[216] M Minow 'Stripped Down like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201 1217 (my emphasis).
[217] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 352 (footnote omitted) (my emphasis).
[218] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 35, 39-40, 49, 119 (Westlaw).

on what we already know, which naturally must be distinguished from prejudging the case by virtue of having access to or knowledge of adjudicative *evidence* or '*disputed evidentiary facts*' before trial.[219] It is submitted that there can be no denying that every judge forms impressions based on such things as having read articles in a newspaper or online or watching television; yet no reasonable person can doubt the judge's ability in general to decide the questions he or she confronts in a given case '*independently of such casual impressions*'.[220] It is then in light of this material consideration that the reasonableness of any possible apprehension of bias caused by pre-trial publicity would need to be assessed. It should nevertheless not be forgotten that an impartial judicial officer is a fundamental prerequisite for a fair trial and a judge should not hesitate to recuse him- or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer was not or will not be impartial.[221] Judicial officers 'must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was *pre-determined* or that a question was decided on the basis of stereotypical assumptions or generalizations.'[222] After all, if there is any reasonable doubt about the adjudicator's impartiality, provision of the most elaborate procedural safeguards will not avail to create the appearance of justice being done.[223]

However, any application for recusal that may be predicated on alleged biasing effects of pre-trial publicity on the presiding officer's adjudication of the case, must not be unfounded, but reasonable when assessed in light of the true facts. The litigant would need to be mindful of the presumption that judicial officers are impartial in adjudicating disputes and that on account of their experience and training they are assumed to be capable of judging fairly. Such a presumption would require cogent or convincing evidence to be rebutted. It would also need to be considered that judicial officers have a duty to sit in any case in which they are not obliged to recuse themselves.[224] Of course, it is not inconceivable that even where there is no call for recusal, a judicial officer may *mero motu* raise the question of recusal where he or

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[219] Flamm *Judicial Disqualification* 303 (my emphasis).
[220] *Ibid* 303 n 14 (my emphasis). See also, for example, Cleaver (1993) *SALJ* 533.
[221] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48.
[222] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 120 (Westlaw) (my emphasis).
[223] Redish & Marshall (1986) *The Yale Law Journal* 484.
[224] *Sarfu* supra para 48.

she considers that his or her impartiality is compromised by adverse pre-trial publicity, in other words, where he or she considers that the publicity has led to a prejudgment of the merits of the case and that his or her mind would on account of the publicity not be open to persuasion by the evidence and submissions of the parties – where that is, the judicial officer considers that he or she is personally disabled from bringing a fair and impartial mind to the case.

In sum, a court must take into account the following considerations in applying the test of reasonable apprehension of bias: 'absolute neutrality is a chimera; the judicial oath of office coupled with the professional expertise of a judge imply that an applicant seeking the recusal of a judge must produce clear and cogent evidence; judicial officers have a duty to sit in matters that come before them and should not lightly recuse themselves; the question of whether a reasonable apprehension exists must be determined on the facts as they appear to the court; and the double reasonableness requirement of the test which emphasises its objective, not subjective, character.'[225]

It is submitted that it is not necessary for present purposes to discuss the various factual circumstances in which recusal may be sought, as dealt with in the case-law and literature. It suffices in this thesis to draw attention to the position where adverse media coverage in advance of a criminal trial may have a biasing effect on the presiding officer in the conduct and adjudication of the case (as referred to above), which may give rise to recusation if on account of such publicity the presiding officer is unable to be open to the evidence and submissions of the parties, but would approach the issues with a closed mind. Moreover, it was considered in chapter four that in the event that an accused reasonably apprehends possible bias on the part of an assessor on the grounds of virulent pre-trial publicity, he or she would have the right to challenge the appointment of the assessor, or would, on good cause, be able to seek the recusal of the assessor.[226]

6.5 The nature of judicial decision-making in criminal cases

> The judge who chooses believes with varying intensity of conviction that he has chosen well and wisely. None the less, even in his mind, there has been a genuine, not merely a nominal

[225] O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 351. See also B Bekink *Principles of South African Constitutional Law* 2 ed (2016) 489.
[226] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 39A-B.

> alternative. There have been two paths, each open, though leading to different goals. The fork in the road has not been neutralized for the traveler by a barrier across one of the prongs with the label of "no thoroughfare." He must gather his wits, pluck up his courage, go forward one way or the other, and pray that he may be walking, not into ambush, morass, and darkness, but into safety, the open spaces, and the light.[227]

It is trite that '[a]djudication and impartiality are inextricably linked': adjudication always requires that a dispute between the parties in a case must be decided by an independent and impartial third party (adjudicator or arbiter) applying legal norms to the set of facts and making factual findings at trial.[228] In the vast majority of criminal cases that come before South African courts, the main dispute between the prosecution and the defence does not concern the law or its application, but the factual question of what events actually transpired and whether the accused committed the crime or is linked to the commission of the crime. On such factual questions, the prosecution and the defence fail to agree, and the only way then to solve the conflict is to hand it over to an independent and impartial or objective third party, a judge or magistrate sitting alone or with assessors, who will decide the facts and the conclusions that follow from them.

Deciding the facts in a non-jury trial requires a level of judicial discretion, since fact-finding involves making complicated judgments whose components cannot be foretold and resolved in advance.[229] Fact-finding discretion relates, for example, to the question of whether X was at the scene of crime at a certain time, or not.[230] Deciding what actually happened usually entails some discretionary judgments about what evidence to hear, what evidence to regard as relevant, what evidence to regard as reliable, and ultimately the court's final conclusions as to what took place.[231] Thus, deciding whether an accused in fact committed the crime in question involves judicial discretion. Judicial discretion, in this context, connotes the studying and weighing of evidence with the power either to believe or to doubt or to reject a version.[232] Judge Jerome Frank, writing extra-curially, observed that trial judges

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[227] BN Cardozo *The Growth of the Law* (1924) [Reprint Edition: 1973] 58-59.
[228] K Malan 'Reassessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa' (2014) 17 *Potchefstroom Electronic Law Journal* 1965 1998.
[229] See, for example, CE Schneider 'Discretion and Rules: A Lawyer's View' in K Hawkins (ed) *The Uses of Discretion* (1992) 47 54, 66.
[230] Barak *Judicial Discretion* 13.
[231] Schneider 'Discretion and Rules' in *The Uses of Discretion* 66.
[232] Barak *Judicial Discretion* 13.

have a wide discretion in finding the facts, for example, when oral testimony is in conflict as to a pivotal factual issue, the trial judge is at liberty to choose to believe one witness rather than another.[233] For Frank, the word 'discretion' is properly used to express the judicial judgment in discriminating as to the weight and cogency of evidence given by the different witnesses, which must be exercised in reaching any conclusion of fact from the evidence.[234] A former Judge of Appeal at the Appellate Division, HC Nicholas, in an extra-curial address, noted that for the assessment of the credibility of witnesses or the credit given to the witnesses' evidence, there are no formulas or rules of thumb.[235] Such evaluation is 'essentially a subjective judgment', and is the resultant of a number of factors whose varying weight depends upon the circumstances, such as veracity, contradictions in the witness' evidence or between the witness' evidence and the evidence of other witnesses, the demeanour of the witness, cross-currents including partiality, prejudice, self-interest and corruption, reliability and the probability or improbability of the witness' version.[236] Moreover, in finding facts, 'the skills of common-sense judgment, understanding of human nature, and so on, play a predominant part.'[237] The question of the probability or inherent improbability of a witness' evidence is assessed in light of the knowledge and experience of the trier of fact.[238] In the latter respect, there is a danger of a wrong conclusion if the knowledge and experience of the trier of fact is deficient, and the arbiter should not draw conclusions as to probability in areas where his or her knowledge and experience are doubtful. The arbiter should always be conscious of the fact that a story which seems to him or her improbable may well be true.[239] The judicial officer also has a discretion to admit or disallow evidence; however, unconstitutionally obtained evidence must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[240] Such a discretion would also need to be exercised judicially and fairly.[241] The judicial officer moreover has a sentencing discretion.

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233 Frank *Courts on Trial* 57.
234 *Ibid* 57.
235 Nicholas (1985) *SALJ* 32.
236 *Ibid* 32-44.
237 J Bell 'Discretionary Decision-Making: A Jurisprudential View' in K Hawkins (ed) *The Uses of Discretion* (1992) 89 106.
238 Nicholas (1985) *SALJ* 43.
239 *Ibid* 43.
240 See section 35(5) of the Constitution.
241 See, for example, *S v Basson* 2007 1 SACR 566 (CC) paras 109-122.

Judicial discretion may also be engaged in applying legal principles or norms to the facts of the case, such as in deciding whether the accused's actions measure up to an objective norm or standard, for example, the standard of a reasonable person on the question of negligence, or whether an accused had intention in the form of *dolus directus* or *dolus eventualis*, or whether the accused acted in common purpose with his or her co-accused or other suspects. This judicial activity is one of concretisation or translating the legal principle or rule to, or giving it real and concrete form in the context of, the specific facts of the case.[242] Judicial discretion may also be involved where the presiding officer must decide on the reach or scope or content of a legal principle or norm. Legal norms may also be mutually inconsistent, in which case the court would need to give preference to one of the norms. A common-law or statutory rule or principle may moreover have to be deviated from where it is inconsistent with the Constitution. There may be other occasions where a legal vacuum or lacuna exists that the court must fill by choosing one normative option.[243] Judicial discretion would be involved in an enquiry as to the essence and scope of the crime charged where the court would need to answer the question of whether the proven facts in a particular case constitute the commission of the crime.

This level of discretion, which a trial judge has in deciding a case, underscores the fact that the judicial function is significantly 'an exercise in choice'.[244] Judicial discretion has been defined as the power given to a judicial officer to choose between two or more alternatives or options, when each of the alternatives is lawful, or the freedom to choose among different possible, but lawful, solutions.[245] Such a definition of judicial discretion assumes that 'the judge will not act mechanically, but will weigh, reflect, gain impressions, test, and study.'[246] Judges choose one interpretation rather than another or elect to accept one precedent and distinguish another.[247] Some evidence and facts may be highlighted and others ignored or given little weight.[248] Judicial officers do not mechanically

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[242] See, for example, Barak *Judicial Discretion* 14-15.
[243] *Ibid* 15-16.
[244] J Dugard *Human Rights and the South African Legal Order* (1978) 303.
[245] Barak *Judicial Discretion* 7.
[246] *Ibid* 7.
[247] Dugard *Human Rights and the South African Legal Order* 303.
[248] RA Posner 'Judicial Behavior and Performance: An Economic Approach' (2005) 32 *Florida State University Law Review* 1259 1270.

decide facts or declare the law in cases where there are conflicting versions or accounts of the facts and competing interpretations, precedents, authorities, and principles.[249] In exercising this choice, a judge may consciously or subconsciously be influenced by preferences derived from his or her own political, social or economic views, in other words, by the inarticulate premises and prejudices which are part of the make-up of the judge; the judicial officer may interpret the evidence through the lens of his or her own experiences, beliefs or ideologies.[250] After all, interpretation is said to be 'an innate, universal, and quintessentially intuitive human faculty.'[251] That a judicial decision on the facts in a trial may be shaped by the experience, temperament, ideology, or other personal non-legalist factors of the judge, may be illustrated by the following example:[252]

> If an arresting officer says one thing and the person he arrested says the opposite, the judge's decision as to which one to believe is likely to be influenced by the judge's background. Was he a prosecutor before he became a judge? A defense lawyer? What experiences has he or members of his family or friends had with police or prosecutors, or for that matter with criminals? Not that these experiences, which may be unrepresentative, are always reliable. But if they are the best data that the judge has to go on, maybe because the other indicators of the witness's credibility are hopelessly inconclusive, it is rational and probably inevitable that he should rely on them as a tiebreaker.

In the present context, these material factors present in the decision-making process again highlight the need for judicial officers, who conscientiously strive to reach a decision free from prejudice, to be mindful of the potential danger of being influenced at a subconscious level in their conclusions at trial by prejudicial material which they have made every effort to lay aside.[253] However, it is submitted that the crucial question that would still remain, is whether despite such knowledge of extraneous or prejudicial material, the presiding officer is, in terms of the prerequisite of impartiality in adjudication, capable of reaching a decision being open to persuasion by the evidence and submissions of the parties. While some have questioned whether judicial officers can readily disabuse their minds of prejudicial information which is not admitted in evidence at trial (thus calling into question the notion that judicial

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[249] Dugard *Human Rights and the South African Legal Order* 303.
[250] *Ibid* 303; MG Cowling 'Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss' (1987) 3 *South African Journal on Human Rights* 177 189; Posner (2005) *Florida State University Law Review* 1270, 1273; Posner *How Judges Think* 69; N Gennaioli & A Shleifer 'Judicial Fact Discretion' (2008) 37 *Journal of Legal Studies* 1 2.
[251] Posner *How Judges Think* 113.
[252] *Ibid* 69.
[253] *Kelly v O'Neill* (2000) 1 IR 354 375.

officers are better equipped to do so than lay adjudicators, by virtue of their training, experience and oath of office), it is inevitable in a unitary court system that judicial officers may be exposed to evidence which they rule to be inadmissible and which they would then be required to disregard when reaching a decision.[254] This, for instance, frequently happens in the case of confessions which are disallowed. The prosecution may be permitted to deal with the content of a confession in cross-examining an accused in a trial-within-a-trial, in order to test the accused's version that the content of the confession is false and that it was prescribed to him or her by the police what to say in the confession (in other words, to test his or her credibility on the issue).[255] A confession may also be provisionally admitted, but subsequent evidence may come to light in the main trial which may render the impugned evidence inadmissible. In a prosecution which I conducted, an accused was acquitted despite the trial judge having had sight of the accused's confession which was ruled to be inadmissible.

In the Oscar Pistorius trial, Masipa J convicted the accused of culpable homicide, despite overwhelming pre-trial publicity which suggested that the accused was guilty of murder. In the Shrien Dewani case, the accused was discharged without being placed on his defence, even though there was extensive pre-trial publicity which portrayed or suggested that the accused was guilty and strong public sentiment that the accused ought to have been placed on his defence. It is submitted that these cases demonstrate that judicial officers are able to lay aside or disregard prejudicial extraneous information and base their decisions on the evidence placed before them at trial. There may be merit in the argument that, being human, judicial officers would not be able to unbite the apple of knowledge, but they would know from their training, experience and oath of office, that they are required to lay extraneous or prejudicial information aside and decide the cases that come before them on the basis of the merits before court. As Justice Van der Westhuizen appositely suggests, which was noted above, a practical approach would be to recognise that judges are human beings and the products of their class, education and ideological and other preferences.[256] 'Judges must then try to the best of their intellectual, moral and emotional ability to take decisions according to the

[254] Hill (2001) *SAJHR* 566; *S v Mthembu and Others* 1988 1 SA 145 (A) 155C.
[255] See, for example, *S v Talane* 1986 3 SA 196 (A) 205E-206D; *S v Mokoena and Others* 2006 1 SACR 29 (W) 40*c-d*.
[256] Van der Westhuizen (2008) *AHRLJ* 261.

Constitution and its values, and the law, as their oath of office demands from them.'[257]

It is further submitted that it is difficult to transpose experimental findings on whether judges can ignore inadmissible information,[258] to real-life decision-making, particularly in an adversarial system involving a continuous point-counterpoint or dialectical process of persuasion by the parties which, as was seen in chapter three, aids in ferreting out erroneous positions, and where the parties are in control of the litigation and evidence-gathering and focus the court's mind on the admissible evidence which the decision is to be based on, and where the trial court is not free to pursue its own agenda but is primarily reliant on the parties for the decision that is ultimately reached.

It is undoubtedly so that that one cannot always gauge the extent of the influence which inadmissible evidence or prejudicial information which comes to light during a trial may have on the subconscious mind of a presiding judicial officer (and/or, where appropriate, his or her assessors), particularly where issues of credibility are being dealt with.[259] However, it is expected of judicial officers, on the basis of their experience, training and oath of office, and assessors, who deliberate with the presiding officer on the merits, to lay aside or disregard prejudicial information and to give an objective decision on the merits.[260] Moreover, in such circumstances, it can be determined on appeal from a consideration of the record whether the trial court was in any way influenced by prejudicial extraneous information or inadmissible evidence (whether that is, there was any irregularity occasioned on account of such information), and indeed whether the court was in any way contaminated by considerations of a non-legal nature, or whether, objectively assessed, the trial court properly determined the guilt of the accused.[261]

Importantly, it is well recognised that genuine adjudication, which attests to the impartiality and party detachment of the adjudicator, will eventually be gauged by the reasons advanced by the trial court in reaching its verdict.[262] In our law, facts are to be determined through legal reasoning by the trial court, which must advance

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[257] *Ibid* 261.
[258] See Wistrich, Guthrie & Rachlinski (2005) *University of Pennsylvania Law Review* 1251.
[259] *S v Mthembu and Others* 1988 1 SA 145 (A) 155C-D; *S v Maputle and Another* 2003 2 SACR 15 (SCA) para 13.
[260] *S v Mthembu and Others* 1988 1 SA 145 (A) 155F.
[261] *S v Maputle and Another* 2003 2 SACR 15 (SCA) para 14.
[262] Malan (2014) *Potchefstroom Electronic Law Journal* 1999.

reasons for the factual findings; the findings, argumentation and conclusions of the court must be strictly law-based.[263] Legal reasoning is a 'logical incidence of judicial impartiality.'[264] The Constitution accounts for this crucial aspect of the rule of law when it expressly states that the courts are subject only to the Constitution and the law, and requires the courts to apply the Constitution and the law impartially and without fear, favour or prejudice, and also enjoins organs of State to promote, among other things, the impartiality of the courts.[265] It is a case of courts administering justice according to law and independently and impartially.[266]

The furnishing of reasons for a decision serves as an important constraint on the exercise of judicial discretion.[267] One commentator remarks that '[m]any are the ideas whose downfall was brought about by the need to explain them, since they contained only external force for which it proved impossible to find a foundation.'[268] A full explanation of a judgment is an important means of avoiding the danger of arbitrary judging.[269] Such explaining of a decision generally trains the judge to think clearly and to raise his or her reasons, including his or her intuitive thoughts, above the subconscious, to the light of day, in order that they should stand the test of criticism by the appellate court, by professionals, and by the general public.[270]

The exercise of judicial discretion is not an 'unbridled discretion'.[271] Such discretion must be exercised judicially and fairly in accordance with the values enshrined in the Constitution and in terms of the rule of law. In a criminal trial, there is a duty on the court to ensure that a trial is fair in substance and the court is obliged to give content to this notion.[272] The limitations on the judicial officer's discretion may be grouped under the general heading of 'fairness', a fundamental characteristic of which is judicial impartiality.[273] Judicial discretion is also constrained by procedural and evidential rules and precedent. The discretion must fundamentally

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[263] *Ibid* 1999.
[264] *Ibid* 1999.
[265] *Ibid* 1999.
[266] Beinart (1962) *Acta Juridica* 99 *et seq*.
[267] Barak *Judicial Discretion* 22-23.
[268] *Ibid* 23.
[269] *Ibid* 23.
[270] *Ibid* 23. See also JD Jackson 'Making Juries Accountable' (2002) 50 *The American Journal of Comparative Law* 477 487, noting that 'the duty to give reasons concentrates the mind with the result that a reasoned decision is more likely to be soundly based on the evidence than one which is not reasoned.'
[271] Barak *Judicial Discretion* 22.
[272] *S v Basson* 2007 1 SACR 566 (CC) para 112.
[273] Barak *Judicial Discretion* 22.

be based on the evidence that comes before the court.[274] Decision-making can moreover be said to be a rule-bound activity and standard-driven. In the fact-finding domain in criminal cases, the trial court is required to determine whether the guilt of the accused has been established beyond a reasonable doubt. When the court evaluates the evidence in making that determination, it must in its reasons for the decision include reasons for the acceptance and the rejection of evidence given by the respective witnesses and the accused.[275] When there is a conflict of fact between the evidence of the State witnesses and that of the accused, it is quite impermissible for the trial court to approach the case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected.[276] The proper approach in such a case 'is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.'[277] As the Supreme Court of Appeal held in *S v Chabalala*, in respect of the correct approach of a trial court in evaluating evidence in making findings of fact:[278]

> The trial court's approach to the case was… holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.

Moreover, the same Court affirmed in *S v Trainor* that in arriving at a decision on the guilt or innocence of an accused, a compartmentalised and fragmented approach to the evaluation of evidence is illogical and wrong.[279] What is required is a conspectus of all the evidence: 'Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering

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[274] *Ibid* 22.
[275] *S v Singh* 1975 1 SA 227 (N) 228F-H, cited with approval in *S v Guess* 1976 4 SA 715 (A) 718H-719A.
[276] *Ibid*.
[277] *Ibid*.
[278] 2003 1 SACR 134 (SCA) para 15.
[279] 2003 1 SACR 35 (SCA) para 9.

whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'[280] In this regard, the Court in *Trainor*[281] endorsed the principle enunciated by Nugent J (as he then was) in *S v Van der Meyden*, that:[282]

> It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.

Nugent J went on to reaffirm the trite principle that 'an accused is *bound* to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent.'[283] A trial court in these circumstances does not have a discretion whether to convict or to acquit. All the same, it must be borne in mind that 'the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'[284] Nugent J explained that '[e]vidence which incriminates the accused, and evidence which exculpates him, cannot both be true - there is not even a possibility that both might be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.'[285] Conversely, if weighed against the State's case and having regard to the probabilities emerging

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[280] *Ibid* para 9 (Court's italics).
[281] *Ibid* para 8.
[282] 1999 1 SACR 447 (W) 449*f-h*, rejecting the erroneous position adopted in *S v Munyai* 1986 4 SA 712 (V) 715G, where it was held: '[E]ven if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'
[283] *S v Van der Meyden* 1999 1 SACR 447 (W) 449*j*-450*a* (my emphasis).
[284] *Ibid* 450*b*.
[285] *Ibid* 449*c-d*.

from the case as a whole, the accused's version is reasonable possibly true, the court is bound to acquit the accused.[286]

In sum, what we desire in the decision-making process is that judges must '"know the law and know life and know human motives."'[287] We want judicial officers to the best of their ability to divorce themselves from subliminal biases and preconceptions and to objectively decide cases on the basis of the merits. We want judicial officers to act prudently and rationally without allowing uncontrolled emotions to influence them.[288] The judicial officer must take all relevant aspects into consideration in deciding a case.[289] We acknowledge the use of prior knowledge on the part of presiding officers, but 'as part of a process of opening up to the possibility of surprise', in other words, to use what they know but to suspend their conclusions long enough to be surprised, to learn.[290] The latter is the open mind we hope for from those who judge.[291] Impartiality is obtained by taking the viewpoints of others into account.[292] Trial judges have considerable discretionary power and the exercise of discretion is shaped by the judge's values and intuitions, which in turn are shaped by the judge's background and experiences.[293] Nonetheless, as the distinguished American Judge, Richard Posner, has observed, '[o]ne must not exaggerate the impact of a judge's career and demographic characteristics on the judge's decisions.'[294] 'Most judges are conscious of the sources of unconscious bias and try with considerable success to overcome them.'[295] The presumption that judges are unbiased, is, according to Posner, 'more than a pious hope.'[296] The court's decision must be made according to the Constitution and its values and the law, as the oath of office would require of judicial officers, and as the oath taken by assessors would demand of the latter. The court's decision must also be reasoned so as to ensure that the decision is not arbitrary but based on the evidence before court.

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[286] See, for example, *S v BM* 2014 2 SACR 23 (SCA) para 27.
[287] G Gunther *Learned Hand: The Man and the Judge* (1994) 276; G Corstens 'The Role of the Judge Under the Rule of Law' (2015) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 170 176.
[288] Corstens (2015) *TSAR* 176.
[289] *Ibid* 176.
[290] Minow (1992) *William and Mary Law Review* 1215-1217.
[291] *Ibid* 1217.
[292] H Arendt *Lectures on Kant's Political Philosophy* (1982) 42.
[293] *Tyson v Trigg* 50 F.3d 436 439 (1995), per Posner CJ.
[294] *Ibid* 439.
[295] *Ibid* 439.
[296] *Ibid* 439.

6.6 Procedural safeguards and judicial mechanisms

> The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.[297]

It has been said that a criminal conviction is not arrived at without many legal safeguards and a full opportunity to set up a defence.[298] Constitutional, procedural and evidential safeguards in the administration of criminal justice are needed because, as one writer observes, the 'state poses no greater threat to individual liberty than when it proceeds in a criminal action. Those proceedings, after all, are the means by which the state assumes the power to remove liberty and even life.'[299]

For present purposes, the focus is to identify those procedural safeguards or judicial mechanisms that are vital to create, promote, or preserve judicial impartiality in adjudication, particularly in the context of adverse pre-trial publicity. In chapters three and four, certain salient or key procedural mechanisms were delineated that are designed to achieve such objective and which would help towards the court deciding a case on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media. Moreover, in chapter five, it was seen that the presumption of innocence serves as an important constitutional mainstay of a fair trial, in that it requires the prosecution to prove its case beyond a reasonable doubt (which is a high standard of proof) before an accused can be convicted of a crime charged, and it requires the prosecution to establish a *prima facie* case as a fundamental precondition to placing an accused on his or her defence. In *Banana v Attorney-General*, the Court outlined and underlined several in-built procedural safeguards or judicial mechanisms that would guarantee judicial impartiality in the face of prejudicial pre-trial publicity, and which would help to rid the influence of prejudice.[300] The safeguards or mechanisms which have been highlighted in this thesis, may be restated as follows:

6.6.1 Perhaps the most important procedural safeguard, which has been emphasised in this work (since it has received little or no attention in the

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[297] *McNabb v United States* 318 US 332 347 (1943), endorsed in *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 33.
[298] J Davids 'Judgments as Evidence' (1968) 85 *The South African Law Journal* 74 78.
[299] RE Barkow 'Separation of Powers and the Criminal Law' (2006) 58 *Stanford Law Review* 989 995.
[300] 1999 1 BCLR 27 (ZS).

literature in the context of pre-trial publicity), is adversarial or accusatorial process, and indeed the nature, structural demands and mode of the South African accusatory trial, where the arbiter is not a jury but a professional judge or magistrate sitting with or without assessors, who deliberate with the presiding officer on the merits of the case in reaching a verdict, and where an impartial judicial officer presides over and keeps the scales even in a contest between the prosecution and the defence.[301] In chapter three it was seen that adversarial process is a fundamental procedural bedrock of a fair trial. Indeed, it may be said that in South Africa's legal system, adversarial process is a condition *sine qua non* of the accused's constitutional right to a fair trial; a fair trial should be adversarial, guaranteeing the autonomy of each party to the dispute and their full participation in the proceedings.[302] In chapter four it was observed that the Constitutional Court has recognised that adversarial or accusatorial process is 'deeply implanted in our country' and is a requirement of a fair trial (it is an unlisted or unspecified component of the right to a fair trial and as such is '*resolutely affirmed by the Constitution*').[303]

It was noted in chapter three several germane advantages of adversarial process, which may be listed as follows:

(i) The presiding officer looks to the parties in the case to frame the issues for trial and judgment.[304] The presiding officer is not free to pursue his or her own agenda; the presiding officer does not take a 'proactive' role in evidence-gathering in contrast to the inquisitorial judge.[305] In the main, the parties determine what evidence the trial court will hear. The trial court is primarily reliant or dependent on the evidence and submissions presented by the parties - in a criminal case, the prosecutor and the accused - in reaching its decision on the case. The presiding officer is relatively passive, leaving it to the parties to adduce the evidence. The presiding officer does not take an active role in the leading of evidence, and the parties are in control of the

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[301] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 55; *S v Rudman and Another; S v Mthwana* 1992 1 SA 343 (A) 348F.

[302] Steytler *Constitutional Criminal Procedure* 215.

[303] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 246 (my emphasis). See also, for example, *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 23; *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) paras 54-55.

[304] *Burdett v Miller* 957 F.2d 1375 1380 (1992), per Posner J.

[305] *Ibid* 1380.

litigation. Adversarial process is party-centred, where the parties play a dominant role in the pursuit of justice and procedural fairness. The relatively passive role which the judge must assume in the adversary system, means that he or she must accept (ie is bound by) the evidence presented by the parties and must decide the case according to its weight. The parties therefore have a greater influence in the court's decision than in inquisitorial systems.

(ii) As the presiding officer is not free to conduct the trial as he or she sees fit and is, as it were, not free to find out what he or she wants to know (instead it is the parties who must be heard), he or she is less likely to act upon any biases.

(iii) Adversarial process presupposes that the arbiter will reach his or her conclusions based solely on the evidence and arguments that the parties properly present, that is, on the issues traversed by the litigants at trial.

(iv) The parties focus the court's mind on the evidence which the decision is to be based on, the import of which is that the parties divert the court's attention away from information outside the trial context, such as prior publicity detrimental to the accused, and inadmissible evidence.[306]

(v) The presiding officer is not seen as putting on the case for one of the parties, and thus in a criminal trial he or she is not regarded by the accused as a second prosecutor or his or her opponent, and his or her neutrality is not placed at risk. In the end, the best guarantee of impartiality on the part of the courts is 'conspicuous impartiality.'[307]

(vi) The arbiter in an adversarial trial is impartial by definition. This is by reason of the fact that he or she is not a party in the dispute, who is partial by definition. The presiding officer occupies a position that enables him or her to see the whole; he or she is not, as it were, an actor, who is part of the play and must enact his or her part, but is detached and judges from a standpoint of disinterestedness – 'withdrawal from direct involvement to a standpoint outside the game is a condition *sine qua non* of all judgment.'[308] Adversarial process and judicial impartiality are thus interdependent and two sides of the same coin.

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[306] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38G-H.

[307] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 27.

[308] Arendt *Lectures on Kant's Political Philosophy* 55, describing the position of the onlooker or spectator who can discover meaning or the truth by restraining him- or herself from acting.

(vii) Adversarial process creates a presumption of judicial impartiality and, consequently, independence. Juxtaposed partialities, or the legal conflict between two parties, produces or enhances concomitant impartiality.[309]

(viii) By giving the trial judge a relatively passive role, impartiality is promoted. Passivity of the arbiter is often celebrated as the best device for counteracting bias and promoting neutrality; uninvolved in the development of evidence, the adjudicator can sit back, observe the tapping of informational sources with calm detachment, and suspend his or her judgment longer than under alternative, or inquisitorial, arrangements;[310] his or her vision is not clouded by the dust of the conflict.

(ix) Judicial impartiality is an ability to postpone the decision or to maintain an open mind in order to receive all the information from both parties. Whereas an integral part of impartiality is the ability to remain undecided at trial or to withhold judgment until all the evidence has been presented by the parties and all the arguments have been heard, adversariness is a necessary condition for impartiality. This is because an undecided attitude during the trial can only be preserved in a procedural situation where two parties alternate before an inactive adjudicator, each one pressing its own hypothesis and by the same token trying to neutralise the opponent's one. The adjudicator's attention shifts from one side to another and the very committal to one hypothesis at one moment becomes its own negation at the next one.[311] This continuous dialectical process of thesis and antithesis or adversary point-counterpoint method of proceeding, helps achieve unprejudiced adjudication. Empirical evidence suggests that once a judge or fact-finder adopts a bias - tentatively decides an issue in favour of one party - it becomes difficult to change that opinion. By introducing dispute at each stage of the proceedings (for example, through cross-examination and counter-arguments), adversarial presentation tends to keep courts uncommitted until all the evidence is in.[312] Impartiality is thus seen as a 'natural by-product' of adversarial process.[313]

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309 Zupančič (1982) *Journal of Contemporary Law* 82; Labuschagne (1993) *De Jure* 356.
310 Damaška *Evidence Law Adrift* 95. See also Landsman *The Adversary System* 45.
311 Zupančič (2003) *European Journal of Law Reform* 95 n 162, 99.
312 Zacharias (1991) *Vanderbilt Law Review* 54.
313 Zupančič (2003) *European Journal of Law Reform* 87.

(x) Impartiality in judgment is obtained by taking the viewpoints of others into account.[314] It is submitted that adversarial process would facilitate such a position in adjudication. Jennifer Nedelsky, albeit in a different context, appositely notes that: '*What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account*. This is the path out of the blindness of our subjective private conditions. *The more views we are able to take into account, the less likely we are to be locked into one perspective*, whether through fear, anger or ignorance. *It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible*.'[315]

In inquisitorial systems, there is a danger that the presiding officer would be locked into one perspective, taking into account that he or she is responsible for leading all the evidence and to such end studies the case docket or dossier before trial, and considering that counsel for the respective parties play a minor or supplemental role in the gathering and presentation of the evidence and have very little say in the conduct of the trial. In adversarial process, by contrast, it is, as it were, essentially the parties who must be heard and not the judicial officer.

(xi) As the presiding officer in the adversary system does not study the case docket before trial, in contrast to judges in inquisitorial systems, he or she enters the trial *tabula rasa* as to the adjudicative or evidentiary facts or facts in dispute and the evidence to be presented at trial. This ideal position of the arbiter in adversarial process eliminates the risk of a prejudgment of the issues and the resultant biased closed mind as to the merits of the case. It prevents the adjudicator from forming tentative hypotheses about the reality he or she is called upon to reconstruct, thereby eliminating the risk of confirmation bias in terms whereof the adjudicator is more receptive to information or evidence confirming his or her preconceptions or hypotheses than to evidence which clashes with them.[316]

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[314] Arendt *Lectures on Kant's Political Philosophy* 42.

[315] J Nedelsky 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91 107, cited with approval in *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 42 (Westlaw) (my emphasis). Nedelsky is a Professor at Osgoode Hall Law School.

[316] Damaška (1975) *University of Pennsylvania Law Review* 1092.

(xii) Adversarial process may also aid in producing a sound judgment or eliminating error or preventing 'blindsiding' on the part of the presiding officer in the decision-making process.[317] After all, it has been said that: 'The best defense against error is to give full play to opposing arguments and to sift them carefully for potential defeaters of the conclusion you are inclined to accept. A person of good judgment… should be capable of constructing arguments on both sides of an issue.'[318] Alas, this is not always the case, where gross miscarriages of justice can occur despite robust or vigorous adversarial contestation. Nevertheless, in the adversary system, counsel on each side of a case has a strong incentive to bring to the court's attention any consideration that favours his or her side.[319]

6.6.2 Coupled with adversarial process, legal representation for the parties is an important controlling mechanism of the judicial authority.[320]

6.6.3 The participation of the trial judicial officer in the fact-finding process with the assessors, that is, the ready access the assessors have to the trial judge and the ongoing guidance he or she is able to provide to them at all stages of the trial, serve as an important guarantee of impartiality on the part of assessors and a means of eliminating the influence of prejudice. The presiding officer also instructs and reminds the assessors that the case is to be decided solely on the basis of the evidence elicited at trial.[321]

6.6.4 In terms of the oath of office of all judicial officers, as well as the oath taken by assessors before they preside in a case, it is to be presumed that they will lay aside irrelevant personal beliefs or predispositions and administer justice without fear, favour or prejudice; there is a trite presumption of impartiality in our law that is not easily dislodged, but requires cogent or convincing evidence to be rebutted.[322] It must be presumed that judicial officers and assessors 'will perform their bounden duty with integrity, and determine the guilt or innocence of the accused free from extraneous considerations, and

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[317] Posner *How Judges Think* 115.

[318] P Woodruff 'Paideia and Good Judgment' in DM Steiner (ed) *The Proceedings of the Twentieth World Congress of Philosophy: Volume 3: Philosophy of Education* (1999) 63 73.

[319] Posner *How Judges Think* 115.

[320] Labuschagne (1993) *De Jure* 356.

[321] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38G-H.

[322] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 12.

free from either prejudice against, or favour for, the accused.'[323] As Judge Posner has remarked, which was noted above, the presumption that judicial officers are unbiased 'is more than a pious hope.'[324] After all, as Justice Dikgang Moseneke eloquently observes:[325]

> [C]ourts must be effective. The bench must be graced by women and men who are properly qualified; who have ample capacity to deal with the issues at hand and to arrive at justifiable decisions that would lead to effective relief. *That means men and women who have a deep understanding of the law, who have the capacity to process facts and who possess the insight to appreciate the inevitable intersection between facts and the applicable law*. For good measure, we have to add *the indispensable requirement of impeccable integrity in the execution of one's judicial chores. Absent any of these four requirements, our constitutional democracy will falter*.

Moreover, in *De Lacy and Another v SA Post Office*, Moseneke DCJ reaffirmed that the Constitution vests judicial authority in the courts and commands that courts must function without fear, favour or prejudice and subject only to the Constitution and the law.[326] The Deputy Chief Justice held that it followed that the judicial function must be exercised in accordance with the Constitution, which means that at 'a *bare minimum*' courts 'must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so.'[327] The Deputy Chief Justice noted further that 'when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and her oath of office.'[328] Moseneke DCJ stated that a judicial officer ordinarily enjoys a presumption of impartiality and where imputations of dishonesty and bias are directed at a judicial officer, such allegations must not be untruthful or without a factual basis.[329]

While there is some debate as to whether a judge can in fact unbite the apple of knowledge, he or she is a trained judicial officer who would know that each case that comes before him or her must be decided on its own merits, in

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[323] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38F.
[324] *Tyson v Trigg* 50 F.3d 436 439 (1995).
[325] Moseneke (2008) *SAJHR* 350 (my emphasis).
[326] 2011 9 BCLR 905 (CC) para 47.
[327] *Ibid* para 47 (my emphasis).
[328] *Ibid* para 48.
[329] *Ibid* para 120. See also *Stainbank v SA Apartheid Museum at Freedom Park and Another* 2011 10 BCLR 1058 (CC) para 36; *Mbana v Shepstone & Wylie* 2015 6 BCLR 693 (CC) para 41 - reaffirming that there is a presumption in favour of the impartiality of a court.

other words, he or she would know that every case must be decided on the basis of the evidence adduced in the case.[330] A judicial officer by his or her experience and training would moreover be aware of the dangers of media reports on 'high profile' cases,[331] and that the decision on facts in one case is irrelevant in respect of any other case (a judgment in a parallel civil case cannot be held against an accused in a criminal trial, particularly in light of the lesser onus in civil cases and because it would constitute an irrelevant hearsay opinion as to the facts upon which it is based. The judicial officer would also know that the State must still prove its case beyond a reasonable doubt in the criminal matter, despite the findings in the civil case).[332]

6.6.5 The open court or open justice principle and the related publicity of trial proceedings guarantee that justice is seen to be done and that courts are responsive, open and accountable. A public trial means public scrutiny: '*the public may see whether judicial officers are independent and impartial*, *whether their decisions are rational and not arbitrary*, the competency and commitment of the prosecution and whether the truth is established at the trial.'[333]

6.6.6 The principle of orality in the accusatory trial allows for maximum participation by the parties in the decision-making process, provides for judicial transparency and helps to ensure that no salient fact is overlooked. The oral adversarial system is structured to try to 'unbias' the court by requiring two zealous presentations of the facts.[334] In addition, oral proceedings seek to:[335]

> … *prohibit biasing evidence from being presented before a judicial proceeding, which could cause the judge to make up his or her mind before the hearing even starts*. *Evidence presented out of the presence of the defendant, without confrontation, objection, or challenge to its relevance and reliability is now thought to be partly to blame for the failing of a written* [inquisitorial] *system*. A "written" system, where evidence comes to the court in a file ahead of the hearing, *does not allow for transparent testing of the evidence to determine if the court has decided the case on the law, or on political, economic, or even corrupt bases*.

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330 *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 115.
331 *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 115.
332 *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) paras 9-10.
333 Steytler *Constitutional Criminal Procedure* 250 (footnote omitted) (my emphasis).
334 Zwier & Barney (2012) *Emory International Law Review* 208.
335 *Ibid* 208-209 (footnote omitted) (my emphasis) – as cited in chapter four.

6.6.7 An opening address by the prosecutor immediately at the inception of the trial concentrates the court's mind on the issues in the case and alerts the court as to what evidence will be adduced by the State to prove its case beyond a reasonable doubt. At the start of the trial, then, the court's attention would thereby be diverted away from prejudicial pre-trial publicity.

6.6.8 The closing arguments by counsel for the respective parties serve as a review of the evidence which each side has presented and affords counsel the opportunity of arguing the inferences that can be drawn from the admissible evidence. The closing address on the merits is an important final act of participation by the parties in the decision-making process, whereby the parties seek to influence the trial court's decision. Again, the court's mind is diverted away from surrounding statements and comment in the media regarding the case, and is focused on the evidence which the decision must be based on.

6.6.9 A trial by judge alone is an important guarantee of fairness in adjudication in the face of adverse pre-trial publicity, since the judicial officer, by virtue of his or her training, experience and oath of office, is less likely to be susceptible to the possible prejudicial influence of such publicity, than a jury consisting of lay adjudicators. For this reason, a trial by judge alone is deemed to be preferable in certain jurisdictions to a jury trial, where the defence believes that it would be impossible for the accused to get a fair trial before a jury on account of heightened adverse media attention that may result in jurors forming preconceived ideas as to the accused's guilt prior to the trial.

6.6.10 As discussed in chapter four, inextricably intertwined with the South African trial, where there is no jury that reaches its verdict in secret, is that reasons are automatically and publicly given for judicial decisions.[336] It is submitted that this is perhaps the second most important procedural safeguard, as it may enable one to determine whether the trial court had any undue regard to extraneous material, such as adverse pre-trial publicity, in reaching its decision; it would enable one to determine whether the court's findings are justified 'on the *admissible evidence*.'[337] The act of writing the judgment

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[336] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 18.

[337] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38I (my emphasis). See also *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 11.

'might provide a check for deliberation as it stimulates self-reflection and offers an opportunity to correct mistakes.'[338] Moreover, in the eloquent words of Koos Malan (as noted above): 'Genuine adjudication, which attests to the impartiality and party detachment of the adjudicator, *will eventually be gauged by reasons advanced in support of the ruling*.'[339] The giving of reasons for a decision is also important with respect to external accountability and public confidence in the proper administration of justice as it subjects judicial deliberation to public discourse.[340] Stating the grounds for a judgment is about rationalisation of the decision and thereby entering into legal and public discourse.[341] In the circumstances, the giving of reasons for a decision is a safeguard against non-virtuousness on the part of the judicial officer; it provides a platform for the virtue or integrity of the judicial officer in decision-making, and it also safeguards judicial accountability.[342]

6.6.11 Whilst the scope of the human factor or personal judgment with regard to interpretation and fact-finding is not removed from the decision-making process, the requirement that court decisions must be based on predetermined normative premises, that is, on established rules, principles or precedents, does help to reduce the possibility of bias or partiality in judging.[343] Such rules contribute to the drawing of lines between relevant and irrelevant factors in decision-making.[344] 'Conceptions of impartiality are thereby given an institutional anchorage, and often also a more precise content, which makes it easier to discourage the decision-maker's own tendencies towards partiality as well as attempts by the parties and others to exert undue influence on him.'[345] From the decision-maker's point of view, rules not only set bounds but also give guidance, support and protection. They facilitate the decision-maker's work by pointing to relevant factors and by giving him or her the right to dismiss, as irrelevant, a multitude of

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[338] Soeharno *The Integrity of the Judge* 126. See similarly, for example, the remarks in Corbett (1998) *SALJ* 118.
[339] Malan (2014) *Potchefstroom Electronic Law Journal* 1999 (my emphasis). Malan is Professor of Public Law, University of Pretoria.
[340] Soeharno *The Integrity of the Judge* 126-127.
[341] *Ibid* 125.
[342] *Ibid* 126.
[343] Eckhoff (1965) *Scandinavian Studies in Law* 17-18.
[344] *Ibid* 18.
[345] *Ibid* 18.

arguments and considerations which might have confused and bothered him or her.[346] Whilst we acknowledge the 'personality impact on judicial decision-making' and take a realistic view of the nature of judicial processes, as dealt with above, 'there is reason to believe that the existence of rules serving as guides to decision-making will have some significance as a check on inclinations towards partiality.'[347] Added to this, the giving of reasons in support of a decision can contribute to the display of impartiality by stressing the impact on the decision of rules, principles and precedents, albeit that this may disguise the personal influence of the decision-maker.[348]

6.6.12 Judicial impartiality is displayed by upholding the principle of equality in litigation and the *audi alteram partem* rule.[349] Both parties at trial should be given the same or equal opportunity of producing their evidence and arguing their respective cases.[350] Except in instances where the accused is undefended, who must be assisted by the court in conducting his or her case, the principle of showing equal regard to the conflicting interests of the parties is not seen where the presiding officer takes an active part in the investigation of the facts and clarification of the issues.[351] For this reason, the display of judicial impartiality 'is*, as a rule, facilitated when investigation of facts and clarification of issues are left to the parties*.'[352]

In addition to the above procedural safeguards or judicial mechanisms, two further aspects may be highlighted as mechanisms that may promote judicial impartiality in adjudication at trial. The first is the appeal or review system.[353] The appeal system is an important safeguarding instrument for the professional character of the judicial officer, particularly in relation to virtuousness or integrity.[354] The appeal system is a form of peer review as judges correct the work of fellow judicial officers.[355] Judges in higher courts are usually more experienced and are therefore qualified to review earlier decisions; in this way, the appeal system may have an 'important *pre-emptive*

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346 *Ibid* 18.
347 *Ibid* 20.
348 *Ibid* 18.
349 *Ibid* 13-14.
350 *Ibid* 13-14.
351 *Ibid* 14.
352 *Ibid* 14 (my emphasis).
353 *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38I.
354 Soeharno *The Integrity of the Judge* 121.
355 *Ibid* 121.

function' as well: 'judges, eager not to be overturned by peers and conscious of climbing up through the judicial ranks, will be extra sharp. *An appeal may also cause reflection on one's own work and thereby improve the quality of deliberation*.'[356] An appeal system is 'a tool against bad deliberation'.[357] The appeal system is also a means of ensuring judicial accountability.[358] It is submitted that the right of appeal may therefore be said to be part of the checks and balances within the judicial system and is a vital mechanism to protect the accused from a biased or an unjust or erroneous decision.[359] 'The right of appeal to a higher court ensures that *law is applied evenly and therefore justly throughout a system*.'[360] The availability of such a corrective process is instrumental in assuring accused persons 'that their treatment at the hands of the state is guided by principles of fairness rather than the individual caprice of a given trial judge.'[361] The appeal system has a further legitimating function in that it also assures the public 'that trial court decisions will be reviewed for accuracy and fairness and adds an aura of probity to the criminal justice process.'[362] Moreover, the availability of appeal provides an *ex post facto* means of ensuring reasonable adherence to the presumption of innocence and the necessity of proof beyond reasonable doubt.[363]

Particularly in relation to judicial decision-making, the second mechanism or instrument that may promote judicial impartiality, safeguard judicial virtue or integrity, character and accountability, stimulate judicial excellence, and safeguard against non-virtuousness in judicial deliberation, is judicial training or education, and, as was

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[356] *Ibid* 121 (footnote omitted) (my emphasis). See similarly, S Shetreet & S Turenne *Judges on Trial: The Independence and Accountability of the English Judiciary* 2 ed (2013) 221, noting that an appeal system 'has a restraining and preventive effect on the judges.'

[357] Soeharno *The Integrity of the Judge* 126.

[358] *Ibid* 121-122, 126. See also Corder 'Judicial accountability' in *The Judiciary in South Africa* 235.

[359] The ACE Electoral Knowledge Network *The ACE Encyclopaedia: Electoral Integrity* (2013) 94 < http://aceproject.org/ace-en/pdf/ei/view> (accessed 18-08-2018).

[360] GY Ng *Quality of Judicial Organisation and Checks and Balances* PHD Thesis Utrecht University (2007) 16 (my emphasis). See also Cameron *Justice* 185, describing the appeal system as a safeguard. See too *S v Steyn* 2001 1 SACR 25 (CC) paras 23-24, observing that the right of appeal or review, being a specified element of an accused's constitutional right to a fair trial, contemplates a reasonable procedure for correcting errors, whether on matters of procedure, analysis of fact, or substantive law, that may have occurred at the trial stage. The appeal or review procedure helps to minimise the risk of wrong convictions and inappropriate sentences - *S v Twala (South African Human Rights Commission intervening)* 1999 2 SACR 622 (CC) para 9. In Steytler *Constitutional Criminal Procedure* 393, it is said that: 'Through appeal and review proceedings consistency and uniformity in the application of the law may be achieved in furtherance of equality before the law.'

[361] RK Calhoun 'Waiver of the Right to Appeal' (1995) 23 *Hastings Constitutional Law Quarterly* 127 179.

[362] *Ibid* 178.

[363] Waye (2003) *Melbourne University Law Review* 447.

observed in chapter four, adherence to a code of judicial conduct, which may be a helpful tool in training.[364] The training and indeed continuing education of or learning by judicial officers may serve as an important controlling mechanism of the judicial function, in the sense of promoting judicial independence and impartiality and the proper dispensing of justice.[365] It has been said that '[t]he characteristic features of judicial decision-making are to a *considerable extent* conditioned by the *professional training of judges*.'[366] Torstein Eckhoff[367] observes that the professional training of judicial officers '*generally leads to a more detached and impersonal attitude towards the facts to be dealt with, thus reducing the impact of personal sentiments and bias*. There is a special reason why this effect might be particularly strong in the study of law. Relevance, as a rule, is only attached to specific events and specific characteristics of human beings. Law does not, as for instance psychotherapy does, deal with the total personality, but with an individual in his particular capacity, e.g. a buyer, a tenant or a reckless driver. *From certain points of view this narrowness may be considered a weakness, but it facilitates the learning of an impartial attitude, and, perhaps even more, the display of impartiality*.'[368]

Legal doctrine, codes of judicial conduct, judicial training and continued learning by and the updating of judicial officers on changes in various areas of the law, can promote and reinforce the attitude of openness and lack of prejudgment on the part of judicial officers which are the hallmarks of attitudinal impartiality.[369]

Legal education is, however, regarded as not being a sufficient guarantee of impartiality in and of itself.[370] Eckhoff explains that there is ample evidence that 'the social and economic background of judges, their professional experience prior to appointment, and their political affiliations, can have an influence on their decision-making.'[371] Gretchen Carpenter similarly observes that unconscious bias 'is probably more common than was believed in the past. Today it is more readily

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[364] See, for example, RJ McKoski 'Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"' (2010-2011) 99 *Kentucky Law Journal* 259 303-311; Soeharno *The Integrity of the Judge* 118-120, 126, 128-131.

[365] Labuschagne (1993) *De Jure* 355. With regard to the aspect of the 'continuing education' of judicial officers as a means to safeguard judicial integrity and accountability, see Soeharno *The Integrity of the Judge* 118-120.

[366] Eckhoff (1965) *Scandinavian Studies in Law* 32-33 (author's and my emphasis).

[367] At the time of writing, Eckhoff was Professor of Law, University of Oslo.

[368] *Ibid* 33 (my emphasis); endorsed in Labuschagne (1993) *De Jure* 355.

[369] W Lucy 'The Possibility of Impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3 16.

[370] Eckhoff (1965) *Scandinavian Studies in Law* 33.

[371] *Ibid* 33.

accepted that even the rigorous training in objectivity that lawyers receive cannot insulate them entirely from their own backgrounds and preconceptions.'[372] Carpenter, nonetheless, remarks that '*awareness that one's judgment may be thus affected must go a long way toward eliminating bias or prejudice*'.[373] It is moreover submitted that even though judicial training would not make inappropriate partiality impossible, it would serve to make it more difficult.[374] Judicial training, codes of conduct, and so on, can 'challenge automatic, unreflective assumptions, patterns of thought and prejudgments that can covertly thwart attitudinal impartiality.'[375] Besides the fact that judicial training 'can reinforce the idea that impartiality is the mainstay of an adversary system of justice' and that virtually every rule governing the trial process is born from a desire to ensure a fair hearing by an impartial court, judicial training can also warn judges and magistrates as to the reality of decision-making cognitive illusions or heuristics and teach them how to combat such subconscious biases.[376] Judicial officers can also be made aware of gender, racial, ethnic and other forms of stereotyping that can influence their decisions.[377] According to one commentator, such education would improve judicial impartiality.[378]

Justice Dikgang Moseneke opines that a precise definition of judicial education 'would diminish the inherently wide scope of what judges and magistrates, once appointed to judicial office, may or ought to learn about the society they serve and the nature of judicial function.'[379] He points out, nonetheless, that traditionally, judicial training tends to '*reinforce*':[380]

> … first impartiality; and integrity; which would include aspects of judicial independence, ethics, judging skill, bias, even-handedness; second competence; which emphasizes judgment writing and delivery, conducting a hearing, evidence and procedure, interpretation of legislative instruments, special or new areas of the law or legislation, fact finding and the exercise of discretion; third; efficiency; which would include computer skills, electronic and manual research skills, case flow management, delay reduction, court administration,

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[372] G Carpenter 'Judiciaries in the spotlight' (2006) 39 *Comparative and International Law Journal of Southern Africa* 361 372. At the time of writing, Carpenter was Professor emeritus in Constitutional Law, University of South Africa.
[373] *Ibid* 372 (my emphasis).
[374] Lucy (2005) *Oxford Journal of Legal Studies* 16.
[375] *Ibid* 16.
[376] McKoski (2010-2011) *Kentucky Law Journal* 303-308.
[377] *Ibid* 308-311.
[378] *Ibid* 306.
[379] D Moseneke 'Access to Education and Training: Pathway to Decent Work for Women' (2011) 14 *Potchefstroom Electronic Law Journal* 2/261 6/261.
[380] *Ibid* 6/261 (my emphasis).

> documentation and archiving and fourth effectiveness; which implies judicial industry and preparedness at hearing, timely judgment delivery, proper formulation of court orders and adaptability.

There has in the past been a belief amongst judicial officers that training can pose a threat to judicial independence.[381] However, if judicial training is intended to influence 'the practices of judges in their day to day work', in other words, if it is intended to influence 'the *way* in which the judges carry out their tasks rather than the particular decisions themselves, there can be no objection to it on the grounds of judicial independence.'[382]

Justice Moseneke refers to the South African Judicial Education Institute ('SAJEI'), which is the judicial education body in South Africa that is responsible for the training of both judges and magistrates.[383] SAJEI was established by the South African Judicial Education Institute Act,[384] which in turn was mandated by section 180(*a*) of the Constitution which provides that national legislation may provide for training programmes for judicial officers.[385] The Preamble of the SAJEI Act affirms that 'education and training of judicial officers are necessary to uphold judicial independence, on the one hand, and to facilitate judicial accountability, on the other, and both are indispensable requirements of a judiciary in a functioning democracy'. The Preamble also states that both are needed for 'enhanced service delivery'. The Preamble recognises that education and training of judicial officers are required as 'the law has become much more complex and varied, develops rapidly and is increasingly influenced by the globalisation of legal systems, trade, technology, new insights and challenges'. The Preamble moreover recognises that 'it is desirable that the education and training of judicial officers should primarily be directed and controlled by the judiciary'. Section 2 of the Act provides that SAJEI was established *inter alia* to enhance judicial accountability and the transformation of the judiciary and to promote the implementation of the values mentioned in section 1 of the Constitution.[386] According to the SAJEI website, the Institute 'was established in order to promote the independence, impartiality, dignity, accessibility and

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[381] K Malleson *The New Judiciary: The effects of expansion and activism* (1999) 156.
[382] *Ibid* 172-173 (author's and my emphasis).
[383] Moseneke (2011) *Potchefstroom Electronic Law Journal* 8/261-11/261. See also Mhango 'Transformation and the judiciary' in *The Judiciary in South Africa* 72-73, for a discussion on judicial training in South Africa under the auspices of SAJEI.
[384] Act 14 of 2008 ('SAJEI Act').
[385] See Mhango 'Transformation and the judiciary' in *The Judiciary in South Africa* 72.
[386] *Ibid* 72-73.

effectiveness of the courts through continuing judicial education'.[387] Justice Moseneke notes that the target group and beneficiaries of the training offered by SAJEI are judges, aspirant judges, military judges, magistrates and aspirant magistrates. The training makes provision for the orientation and training of newly appointed judicial officers and continuing judicial education for appropriate categories of judges in active service. Orientation training is compulsory for all newly appointed judicial officers. Similarly, any judge or magistrate who is elevated to a higher court or a position requiring new or additional leadership skills should submit to compulsory training suited to the new appointment. In principle the education programme of SAJEI should reach all judges on an elective or minimum attendance basis.[388]

One writer opines that the judicial virtues which are indispensable for realising moral quality in adjudication, namely 'judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency', should be developed already at law schools with students, certain of whom may have aspirations of becoming a judicial officer.[389] Given that in South Africa at present, there is much concern with 'the rapid transformation of the judiciary',[390] legal education at universities may need to attend very seriously to '"its apprenticeship of professional identity."'[391] Law faculties should contribute to the character building of their students.[392] In this regard, it is explained that curricula could focus on such aspects as the establishment of the facts of a case and fostering 'the formation of courage, independency and impartiality, for instance by confronting students with all kinds of psychological knowledge as regards the influence of group dynamics and institutions on human behaviour and by allowing them to practice adequately coping with such obstacles to acting virtuously, which are always present.'[393]

It is submitted that judicial training can teach judicial officers on how to properly adjudicate on a case, when confronted with adverse pre-trial publicity, and how to prevent such from biasing them in their decisions.

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387 <https://www.judiciary.org.za/index.php/sajei/governance> (accessed 20-08-2018).
388 Moseneke (2011) *Potchefstroom Electronic Law Journal* 8/261.
389 I van Domselaar 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) 44 *Netherlands Journal of Legal Philosophy* 24 38.
390 See Preamble of the SAJEI Act.
391 Van Domselaar (2015) *Netherlands Journal of Legal Philosophy* 38.
392 *Ibid* 38.
393 *Ibid* 38.

CHAPTER 7

THE *KRION* CASE

7.1 The gravamen of the application for a stay of prosecution

Being the case study of the present thesis, this chapter examines the merits of the application for a stay of prosecution in the *Krion* case and how the later trial and appeal were adjudicated on. In chapter one, the background of the application was noted. It was stated what the substantive grounds were on which the application was based. It is submitted that the most significant issue that had to be dealt with in the case was whether there was a real and substantial risk that the trial court would prejudge the guilt of the accused and be biased or prejudiced against the accused in the adjudication of the case on account of knowing the adverse findings that were made against the accused in the parallel civil judgments - findings which imputed directly or by implication criminal conduct or wrongdoing to the accused who still had to be tried in the criminal case. This submission is made for the following reasons:

7.1.1 It was noted in chapter five that an accused's right to be presumed innocent in terms of the South African Constitution is confined in scope to an accused's criminal trial – it is a fair trial right – and it has a narrow construction: the presumption of innocence means that the onus is on the State to prove the guilt of the accused beyond a reasonable doubt. The presumption of innocence is a normative principle that regulates the incidence and standard of proof at trial. It is violated if a reverse onus is placed on an accused to prove his or her innocence or to disprove an element of a crime on a balance of probabilities. The presumption of innocence is breached whenever a legal burden is placed on an accused which could result in a conviction despite the existence of a reasonable doubt as to the accused's guilt – the '*sole determinant*' of constitutional compliance with the right to be presumed innocent is whether there is a possibility of conviction despite the existence of a reasonable doubt.[1] If a provision relieves the prosecution of its burden of proving all the elements of a crime, the presumption of innocence is infringed.

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[1] Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in *Criminal Evidence and Human Rights* 31 (my emphasis).

As the impugned civil judgments that arose from the *Krion* matter did not place a reverse onus on the accused, it is submitted that the accused's right to be presumed innocent was not called into question by the adverse findings against the accused made in the decisions. It is further submitted, as was also considered in chapter five, that given the import or application of the presumption of innocence being that there is no onus on an accused to establish his or her innocence and that it is required of the prosecution at trial to establish a *prima facie* case against the accused before he or she can be placed on his or her defence, failing which the accused would be entitled to be discharged in terms of section 174 of the Criminal Procedure Act at the close of the State's case (if, that is, there is no evidence on which a reasonable person could convict), the accused's associated rights to remain silent and not to testify in the *Krion* criminal proceedings were not impugned by the civil judgments.

It was moreover observed in chapter five that a broad construal of the presumption of innocence has been espoused by the European Court of Human Rights, in terms whereof the presumption *inter alia* also has a reputation-related aspect which protects the image or good reputation of the suspect or accused by prohibiting a statement being made by a public official, including a court of law in parallel judicial proceedings (by way of a formal finding or by implication in the court's reasoning), which reflects an opinion or suggests that the suspect or accused is guilty before he or she has been proved so according to law. It was submitted that this wide reading of the presumption of innocence does not find application under South African law. This is by reason of the fact that the scheme of the South African Constitution shows that the function of the right to be presumed innocent, which is a discrete, specified element of the right to a fair trial, is not to protect the reputation or good name of an accused. The right to a good name and reputation is encompassed or guaranteed in the fundamental right to dignity under the Bill of Rights. As stated in chapter five, the law of defamation consequently lies at the intersection of the right to freedom of speech and the right to human dignity. The fundamental right to be presumed innocent also requires a purposive interpretation, in terms of which the meaning of such right is to be ascertained by an analysis of the purpose of the guarantee.

Since the Constitutional Court has made clear that the purpose of the presumption of innocence 'is to minimise the risk that innocent persons may be convicted and imprisoned', which it does 'by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt',[2] and given the specified association of the presumption with the accused's right to a fair trial in the Constitution, and not outside the trial context in relation to other rights contained in the Bill of Rights, the very wide meaning ascribed to the presumption by the European Court of Human Rights would not apply or be apposite under South African law.

It was noted in chapter five that the presumption of innocence is not to be conflated with the accused's fundamental right to be tried by an impartial court, and that when one has to consider the aspect of a preconceived idea or notion as to the accused's guilt which a trial court may hold, one calls into question the notion and constitutional imperative of judicial impartiality; prejudgment of the issues by the presiding officer (as was also considered in chapter six) constitutes clear bias.

7.1.2 Since full disclosure of the case docket in the *Krion* case was made to the defence, the defence would have had adequate opportunity to cross-examine witnesses if it appeared that their evidence was tainted or influenced by the findings against the accused in the civil judgments, if that is, there was tailoring of the witnesses' evidence by virtue of the civil judgments. It was seen in chapter two, in the context of the *sub judice* rule, that the adversarial nature of criminal proceedings in South Africa and the pivotal role that docket disclosure and cross-examination play in it - which usually would be an effective means of pointing to specific instances of tainted testimony - would generally enable a trial court to make findings as to whether or not a witness' testimony was unduly affected or influenced by exposure to adverse pre-trial publicity or media coverage (televised or otherwise) of a trial. It is further submitted that perjury laws would be a means of encouraging witnesses to give truthful testimony. Where an accused is undefended, a duty rests on the prosecution to bring to the attention of the trial court any discrepancies between a witness' police statement and his or her *viva voce* evidence.

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[2] *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 26.

7.1.3 It was considered in chapter two that in terms of the *stare decisis* principle it is only the *ratio decidendi* or legal principle on which a court bases its decision that would be binding on another court. This same principle applies where a decision is that from certain facts certain legal consequences follow – it is the legal principle abstracted from the facts which is binding in any case raising substantially similar facts. The decision on the facts would not be binding on another court except as between the same parties. In the circumstances, the factual findings in the civil judgments pertaining to the *Krion* matter would not have been binding on the criminal trial court, where the parties were different and where the State was still required to prove the guilt of the accused beyond a reasonable doubt – it was incumbent on the criminal trial court to decide the case on the basis of the evidence placed before it, that is, on its own merits. This would accord with the trite principle that the decision on the facts in one case is irrelevant in respect of any other case, and a court must confine itself to the evidence produced in the case being tried before it.[3]

Moreover, the facts which the State was required to prove in order to obtain a conviction against the accused in the criminal trial could not be established by proving the civil judgments.[4] This is particularly because of the lesser onus of proof in civil cases, as well as the possibility that the facts found in the civil judgments did not necessarily imply the absence of any other circumstances which might have amounted to a defence to the criminal charges.[5] The civil judgments were also inadmissible evidence of the facts upon which they were founded where those facts would be in issue in the subsequent criminal proceedings; in other words, the civil judgments could not be used as evidence of the commission of the acts which formed the basis of the criminal charges.[6] The civil judgments constituted hearsay opinions in relation to the facts on which they were based; the civil judgments were

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[3] See *R v T* 1953 2 SA 479 (A) 483A; *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D) 801F-G; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9.

[4] Compare *R v Lechudi* 1945 AD 796 801, as applied in *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9.

[5] See Davids (1968) *SALJ* 75.

[6] See, for example, Kruger *Hiemstra's Criminal Procedure* 24-100, noting that a judicial record 'does not prove that the accused actually committed the act.' It only proves that the judgment was given and that witnesses said what the record portrays. '*Whether the court made the correct finding will have to be decided afresh*.' (*Ibid* 24-100). (My emphasis). Compare also VG Hiemstra 'Khanyapa se saak: eggenote as getuies in strafsake' (1981) 5 *South African Journal of Criminal Law and Criminology* 22 26, endorsing *S v Gabriel* 1971 1 SA 646 (RA) 663H.

irrelevant because they expressed opinions on matters which the court in the subsequent criminal trial would itself have to decide.[7] The civil judgments, then, would merely have established or constituted evidence that the decisions were made, similarly to the position where the record of previous judicial proceedings are proved merely to establish the statements that were made by witnesses in those proceedings.[8] The position is similar under English law where findings in earlier civil proceedings are inadmissible in later criminal cases, even if they consist of or necessarily involve findings of guilt or innocence of criminal charges.[9] A '*finding*' in a civil case is not admissible in a subsequent criminal case at common law.[10] Of course, a court *order* would be admissible on a charge of contempt of court, and a *record* of a witness' *testimony* in relation to a charge of perjury.

It ought not to be forgotten that the same wrongful act may give rise to criminal and delictual or civil liability, and may thus found both a criminal prosecution, the primary object of which is the punishment of the accused for the crime committed, and a civil action, the primary object of which is the enforcement of a right claimed by the plaintiff against the defendant, or to, as it were, make compensation or restitution to the injured person or victim or to give reparation or award damages to the individual for the harm or wrong done.[11] A delict 'is not a distinct factual concept; it is merely a wrong regarded from the individual's point of view and in the light of procedure. When the state assumes the right to pursue a wrong, to exact punishment

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[7] See A Paizes 'Evidence' in E du Toit, F de Jager, A Paizes, A St Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 24-110A. Compare also *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 4 SA 35 (T) 38A-C; *Prophet v National Director of Public Prosecutions* 2006 2 SACR 525 (CC) para 42; PJ Schwikkard 'Selected Statutory Exceptions to the Hearsay Rule' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 310 311-312 (para 15 2 1).

[8] See Paizes 'Evidence' in *Commentary on the Criminal Procedure Act* 24-110A. Compare also Schwikkard 'Selected Statutory Exceptions to the Hearsay Rule' in *Principles of Evidence* 312. See too, for example, *S v Saat* 2004 1 SACR 87 (W) 95*b-c*.

[9] See, for example, HM Malek (gen ed) *Phipson on Evidence* 16 ed (2005) 1392 (para 44-91).

[10] See Tapper *Cross and Tapper on Evidence* 117, with reference *inter alia* to the New Zealand case of *Rudman v Way* (2008) 3 NZLR 404 paras 25-27 (my emphasis).

[11] See, for example, Hahlo & Kahn *The South African Legal System and its Background* 119; D Pont 'The Law of Delict, Prof. R. G. McKerron: 2nd. ed. Juta, Kaapstad, 1939. 30/~.' (1940) 4 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 163 164; NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6 uitg (1989) 1-3; RG McKerron *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971) 1-2; PQR Boberg *The Law of Delict: Volume 1: Aquilian Liability* (1984) 1, 3; JC van der Walt & JR Midgley *Principles of Delict* 3 ed (2005) 2-4 (para 3); J Neethling & JM Potgieter *Neethling-Potgieter-Visser: Law of Delict* 7 ed (2015) 7-8; Snyman *Criminal Law* 3-5.

and so effect atonement we call the proceedings criminal and the wrong, regarded from this point of view, a crime. The state may also allow the individual directly harmed by the wrong to sue for readjustment of his interests infringed by it. Regarded from this point of view the wrong is called a delict.'[12] If a person is charged in a court with having committed a crime, the trial is governed by the rules of criminal procedure, where the standard of proof is proof beyond a reasonable doubt. If someone claims damages on the ground of a delict, the trial is governed by the rules of civil procedure, where the burden of proof is proof on a balance or preponderance of probabilities, which is a lesser onus than proof beyond a reasonable doubt.[13] Not only do the aims, procedures and standards of proof differ, but the criminal prosecution and the civil action can be conducted successively or at the same time, and a decision for or against the wrongdoer in one is not conclusive as to the other.[14] Crime and delict must be regarded as *complementary*, not mutually exclusive; 'the same conduct may constitute both a crime and a delict and hence underlie different fields of liability which are *not mutually exclusive*.'[15] It is further a fundamental principle in our law that:[16]

> … a judgment *in personam*, whether given in civil or in criminal proceedings, though it is evidence of the fact that the judgment was given, is not evidence, against persons who are not parties to the proceedings, of the truth or correctness of the judgment… 'Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not, with one exception, admissible for or against strangers in proof of the facts adjudicated. *They are not admissible against them because it is an obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could therefore have exercised no control* - or, to express the same sentiment in technical terms *res inter alios acta alteri non nocere debet* - and they cannot be received in their favour even as against a party thereto, because it is thought, with very questionable propriety, that the previous rule might work injustice unless its operation were mutual.'[17]

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[12] FP van den Heever *Aquilian Damages in South African Law: Volume 1* (1944) 2.
[13] See, for example, *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 262-263; *Miller v Minister of Pensions* (1947) 2 All ER 372 (KB) 374A.
[14] WP Keeton (gen ed) *Prosser and Keeton on The Law of Torts* 5 ed (1984) 8.
[15] FFW van Oosten 'Seriousness, Defamation and Criminal Liability' (1978) 95 *The South African Law Journal* 505 512 (my emphasis). See also McKerron *The Law of Delict* 1; Allen *Legal Duties* 235.
[16] *R v Lee* 1952 2 SA 67 (T) 69D-G (my emphasis).
[17] See also Malek (gen ed) *Phipson on Evidence* 1380-1382 (paras 44-76-44-78). In *S v Khanyapa* 1979 1 SA 824 (A) 840F, it was held that a judgment in a civil case is conclusive as between the parties in the case, but not against a person who was not a party to the dispute.

Thus, where the accused in the *Krion* case were not party to the civil proceedings, the civil judgments could not be held against them in the criminal trial, an aspect which the criminal trial judge would have been well aware of.[18]

7.1.4 It was seen in chapter four that a prosecutor in a criminal trial must act independently and impartiality, that is even-handedly and without fear, favour or prejudice. Prosecutors must not prosecute in single-minded pursuit of a conviction. In this regard, they have a duty to disclose either to the defence or to court, if the accused is undefended, facts harmful to the State's case. Prosecutors are not required merely to obtain a conviction, but to see that justice is done. However, the impartiality required of prosecutors is not the same as that required of the presiding judicial officer. Presiding officers are held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. The presiding officer must keep an open mind throughout the proceedings until judgment; he or she is not permitted to form an early opinion as to the guilt or innocence of the accused. On the other hand, it is inevitable that the prosecutor will form an early opinion as to the guilt of the accused based on studying the case docket to found the institution of a criminal prosecution. The prosecutor would thus entertain a natural bias or predisposition towards the guilt of the accused. In an adversarial trial, the prosecutor, in conducting the prosecution on behalf of the State, will be partisan, and thus he or she will inevitably be perceived as biased by the accused. It is virtually inconceivable that an accused in a criminal case would ever hold the view that a prosecutor is objective, given that it is the prosecutor who reads the case docket, compiles the charge sheet and ultimately prosecutes the accused. The prosecutor conducts the case for one of two sides in a trial, namely the State, as representing the citizenry. It is the function of the prosecutor to fairly place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime, for the very purpose of obtaining a conviction.[19] It is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it will.

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[18] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 10.

[19] See *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 11; *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13; *S v Prinsloo and Others* 2016 2 SACR 25 (SCA) para 181.

In the circumstances, where the prosecution made full disclosure of the contents of the case docket in the *Krion* case, no substantive case could be made out by the Applicant in the pre-trial motion that the prosecutors would be unduly influenced by the adverse findings in the civil judgments. It was, moreover, observed in chapter four that any additional knowledge and understanding of the facts of a case which a prosecutor may gain or derive from information outside the parameters of the case docket, does not amount to prosecutorial bias of a kind that may result in trial prejudice. It is in the best interests of all, even that of the accused, for the prosecutor to have as much evidence available as possible in his or her position as 'truth-seeker'.[20] What one would look for, as borne out by the case-law, to establish prejudicial bias on the part of the prosecutor is, for example, where he or she wages a personal vendetta against the accused, impairs the conduct of the proceedings and the dignity of the court, or uses the same office as the trial judge's assessors, or where he or she launches a prosecution upon patently insufficient evidence or seeks to foist his or her opinion in the matter (that is, by fraud or deception) upon the trial court.

7.1.5 It was considered in chapter two that the publishing of judicial decisions in law reports is integral or indispensable to the fundamental rule of precedent. It was also noted that it would be most improper for an editor of a law report to don the mantle of a censor and refuse to report a decision or excise a portion of a judgment which he or she considers wrong. A law reporter should also not assume the power to shape the course of things to come in later cases or in the development of the law.[21] In the premises, it is submitted that it was not wrongful to publish the civil judgments in relation to the *Krion* matter before the criminal trial was proceeded with, especially given that their possible effect on the criminal trial court was highly speculative and given the trite principle that there is in general no *a priori* answer to the question of whether a trial will be fair or not – 'fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision.'[22]

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[20] *S v Shaik and Others* 2008 1 SACR 1 (CC) para 67.
[21] See Hahlo & Kahn *The South African Legal System and its Background* 283.
[22] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 2 SACR 113 (CC) para 13.

It is submitted that the central question was *not* whether the pronouncements in the civil judgments *tended* to prejudice the outcome of the criminal case (which was analogous to the erstwhile common-law *sub judice* rule), but whether there was a real and substantial risk that they would bias or prejudice the criminal trial court in the adjudication of the case, similarly to the position of adverse pre-trial publicity.[23] It is submitted that such is a determination which the publishers of the law reports could not make when publishing the civil judgments in question, *a fortiori* where South Africa does not have jury system. Mere conjecture or speculation that prejudice might occur will not be enough to make a publication unlawful.[24] What is more, as the civil judgments were not binding on the criminal trial court on any questions of fact and could not be used against the accused where they were not parties to the civil disputes, this reinforces the argument that it was not wrongful to publish the decisions in the law reports whilst the criminal trial was pending.

7.1.6 It is submitted that whether or not the criminal trial would be seen to be fair in light of the adverse findings or pronouncements in the civil judgments, had to be assessed on the basis of whether the accused received a fair trial or not, particularly in an adversarial judicial system (justice would be seen to be done if the accused received a fair trial), and in light of the reasons given by the criminal trial court for its verdict, which, as noted in chapters four and six, is regarded as a pivotal, if not an ultimate, safeguard against abuse by a court.

The salient substantive issue raised in the application for a stay of prosecution in the *Krion* case, relating to the impartial adjudication of the trial, is now discussed.

7.2 The impugned findings or pronouncements in the civil judgments

The civil judgments in question related to the liquidation of the scheme or the entities in the name of which the scheme was run (particularly the question of the setting aside of impeachable transactions or dispositions made to investors by the operators of the scheme (the debtors) when there liabilities exceeded their assets – the

[23] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34F; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 19.

[24] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 19.

scheme was insolvent *ab initio*), the question of whether the amounts paid to the scheme by investors were taxable, and the sequestration of one of the accused (pursuant to the dissolution of the Ponzi scheme).

Various pronouncements were made in these decisions by several courts, including the Supreme Court of Appeal, which formed the basis of the application for a stay of prosecution. Some of these pronouncements or findings were as follows:

- The audacity of its perpetrators and the credulity of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. It was operated from the beginning of 1998 and, as all these schemes do, collapsed when the inflow of funds could no longer sustain the outflow of extravagant returns to participants… Its turnover was some R1.5 billion. In order to throw regulatory authorities off the trail it was at one time or another conducted by entities called MP Finance Consultants CC, Madicor Twintig (Pty) Ltd, Martburt Financial Services Ltd, M & B Koöperasie Beperk and Krion Financial Services Ltd. The way in which the scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with "interest" was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that his already enormous interest was compounded. Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme, investors received repayment of their capital and their profit when due. Sometimes an investor would leave the capital and/or the profit in the scheme and this would then have been reflected by means of a book entry as a payment and a new investment. Other investors would take their capital and profit on the due date, some of whom returned after a while to reinvest a similar amount.[25]
- During the relevant period one Mrs B [with reference to accused 1: Marietjie Prinsloo], acting through these different entities and represented by agents, solicited many millions of Rand from a multitude of investors. Mrs B held out to these investors that they would receive enormous returns on their money. Initially many received these returns, described as 'dividends' and many were tempted to plough back their gains into the scheme. It is common cause that the scheme, apart from being in contravention of the regulations published in terms of the Consumer Affairs (Unfair Business Practices) Act No 71 of 1988, was a fraudulent and unlawful pyramid scheme. It collapsed during March 2002 and substantial losses were incurred… Mrs B used the following *modus operandi* in obtaining funds. Participants would pay their deposit usually through agents. These agents would issue receipts. During the relevant period about 30 000 deposits were made, 15 000 of these were under R50 000. It is common cause that the huge inflow of

[25] *Fourie NO and others v Edeling NO and others* 2005 4 All SA 393 (SCA) para 1. See also *Janse van Rensburg and Others NNO v Myburgh and Two Other Cases* 2007 6 SA 287 (T) para 1.

deposits was used to fund the dividends and returns that were promised and to refund an investor's capital where this was required. Mrs B's micro lending businesses generated insufficient income to make these payments. This led to a situation where Mrs B had to, as it were, 'rob Peter to pay Paul'. The demise of the scheme was inevitable. Where a depositor reinvested his/her funds into the scheme a new contract was concluded. A fresh certificate and reference number was issued. Agents would assist in making payments to participants. Funds flowed mostly in cash. Agents received a commission of 1% per month based on the amount deposited by a participant. It is estimated that R175 million was paid to agents. The amount retained by the perpetrators of the scheme is unknown but is believed to be substantial. The majority of the participants were losers who ultimately received nothing or less than the amounts that they had invested in the scheme.[26]

- For some years beginning in 1998 one Marietjie Prinsloo operated an illegal investment enterprise commonly called a pyramid scheme. As is the pattern with such schemes, it readily parted greedy or gullible 'investors' from their money by promising irresistible (but unsustainable) returns on various forms of ostensible investment. It paid such returns for a while to some before finally collapsing - owing many millions - when the predictable happened and the total amount of supposedly due returns vastly exceeded the total amount of obtainable investment money. The scheme was conducted by way of successively created entities, incorporated and unincorporated. They were all eventually insolvent.[27]
- Prinsloo [with reference to accused 1: Marietjie Prinsloo] operated the scheme with the aid of family and employees, as also so-called agents who solicited and transmitted investors' deposits in return for commission. She controlled the various entities in the names of which the scheme was conducted and procured their printing of a range of convincing-looking documentation issued to investors when they made deposits. This included acknowledgments of receipt, membership certificates and share agreements, all of which purported to pertain to their investments. Most of the money received by the scheme was kept in cash and not banked. This cash float provided the source of payments to investors. However, substantial amounts of it were appropriated by Prinsloo and her accomplices. Some investors received repayment of their investments plus returns. The majority received less or nothing. What is of essential importance in the present matter is that throughout the tax years in question, ie 1 March 1999 to 28 February 2002, the perpetrators of the scheme knew that it was insolvent, that it was fraudulent and that it would be impossible to pay all investors what they had been promised.[28]

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[26] *Income Tax Case No 1789* 67 SATC 205 207-208.
[27] *MP Finance Group CC (In Liquidation) v Commissioner, South African Revenue Service* 2007 5 SA 521 (SCA) paras 1-2.
[28] *Ibid* para 10.

- It is common cause that the Krion Scheme conducted business in contravention of the provisions of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 in that it constituted a multiplication scheme as defined in Government Notice 1135 of 9 June 1997 by offering an annual interest rate to investors in excess of 20% above the repo rate as determined by the South African Reserve Bank and declared illegal in terms of s 12 of that Act. It is furthermore common cause that the scheme conducted the business of a bank in contravention of s 11(*a*) of the Banks Act 94 of 1990. The defendants do not deny that the scheme was a fraudulent scheme and admit that it has been declared unlawful by various orders of court. Finally, it is also common cause that the scheme has been declared to have been insolvent from 1 March 1999, by virtue of its liabilities exceeding its assets.[29]
- [T]he entities run by Prinsloo made their money by swindling the public.[30]

In one of the Supreme Court of Appeal judgments, Marietjie Prinsloo was described as a 'gifted swindler' who knew how to keep her 'fraudulent business' going.[31] Her business dealings were characterised as 'deceitful'.[32] The Court deemed the deposits or 'loans' made in or to the scheme as illegal in light of the Banks Act and the Consumer Affairs (Unfair Business Practices) Act.[33] It was pointed out that '[t]he perpetrators of the scheme knew the investments to be illegal.'[34] It was observed that the 'whole idea of the scheme' was to use investor money to pay the claims of other investors who had invested earlier; that there was no income from Marietjie Prinsloo's micro-lending business to pay investors; that the capital of later investors was used to pay the capital and extravagant returns to other investors; that '[t]he nature of the scheme dictated its insolvency. It had no assets of any importance and huge liabilities, all of which were due and payable and very few of which could be met except by incurring further liabilities; so later investors were clearly prejudiced.'[35]

The unreported sequestration judgment also made mention of the illegality of the scheme in terms of the Banks Act and the Consumer Affairs (Unfair Business Practices) Act, and described in some detail how the scheme was operated.[36] It was stated that the soliciting of investments in the scheme was done by means of misrepresenting to the public that the investments would be used in Marietjie

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[29] *Janse van Rensburg and Others NNO v Myburgh and Two Other Cases* 2007 6 SA 287 (T) para 4.
[30] *MP Finance Group CC* supra para 11.
[31] *Fourie NO and others v Edeling NO and others* 2005 4 All SA 393 (SCA) para 15.
[32] *Ibid* para 15.
[33] *Ibid* para 13.
[34] *Ibid* para 13.
[35] *Ibid* para 13.
[36] *Van Eeden and Another v Engelbrecht* (2590/2002) 2002 ZAFSHC 21 (3 December 2002).

Prinsloo's micro-lending business, in terms whereof an investment would effectively be loaned out at an interest rate of 30% per month, of which the investor would receive 10% per month.[37] Thus, clear fraud was committed in obtaining investments from the public.[38] It was noted that there was no underlying business which generated any income from which investors could be paid their interest, and consequently new investor money had to be used to pay earlier investors.[39] It was observed in respect of the particular accused who stood to be sequestrated (who is also a niece of Marietjie Prinsloo), that she was not only an agent in the scheme who solicited investments from the public but was also involved in the administration of Ms Prinsloo's business, and thus she must have been aware of the true facts underlying the scheme, especially when the Reserve Bank launched its investigation against the scheme. If she did not carry such knowledge of the true facts, she at least acted recklessly in respect of the facts and the legal implications thereof.[40] She moreover failed to herself investigate the true facts pertaining to the scheme and was therefore knowingly a party to a scheme that functioned in a reckless manner.[41]

Besides the above opinions expressed by the civil courts, a media summary was issued by the Registrar of the Supreme Court of Appeal pertaining to the findings of the Court in one of the judgments, which said *inter alia*:[42]

> Pyramid scheme swindlers must pay tax on their takings. This is the conclusion reached by the Supreme Court of Appeal. The case before it involved an illegal and fraudulent scheme operated by Marietjie Prinsloo through various corporations in the tax years 2000 to 2002 in Gauteng and neighbouring provinces… The scheme made its money by illegal means… The operators took the money for their own benefit, not with the intention to comply with supposed contracts with the investors. The scheme never had that contractual intention…

It is clear from the afore-going pronouncements and statements, that, as Ngoepe JP observed in the *Krion* pre-trial motion, '[t]he gist of them all was that they regarded the activities forming the substance of the indictment as being fraudulent and unlawful.'[43]

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[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.
[42] Media Summary – Judgment delivered in the Supreme Court of Appeal: *MP Finance Group v CSARS* (31-05-2007).
[43] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 4. It may be mentioned that the scheme was incorrectly referred to in the civil judgments as a pyramid scheme, whereas it was a multiplication scheme that was operated by the accused.

7.3 The Applicant's argument and the State's argument

Counsel for the Applicant argued in essence that the trial judge would be biased or prejudiced against the accused as a result of the above-mentioned pronouncements contained in the civil judgments.[44] This was particularly so by reason of the fact that the civil courts expressed their views on the alleged illegal activities of the accused which formed the substance of the charges that the accused were facing in the criminal case. It was argued that the findings could affect the objective and impartial consideration of the criminal case by the trial court, and indeed that the findings gave the appearance that the trial court would be biased. Counsel relied on the old *sub judice* test for contempt of court *ex facie curiae* (which was considered in chapter two), in arguing that it was immaterial whether the trial court in the criminal case would in fact have been unduly influenced or been prejudiced against the accused by the findings in the civil judgments; it sufficed if the pronouncements tended to prejudice the outcome of the criminal case.

In opposing the application for a stay of prosecution, the State contended, with reference to the analogous position of adverse pre-trial publicity and an accused's right to a fair trial, that the question which needed to be determined was whether there was a real and substantial risk that the criminal trial court would be biased in the adjudication of the case.[45] It was argued that the trial court itself was best placed to answer that question as the issue of fairness must be decided on the concrete facts of each case and the prevailing circumstances and not in a vacuum - it could not be resolved in the abstract - and the right to a fair trial requires a substantive, rather than a formal or textual approach.[46] The trial court was the proper forum to determine the question as the trial judge could have assessed the circumstances which existed and decided whether the available procedures were sufficient to enable the court to reach its verdict with an unclouded and open mind; or whether, exceptionally, a stay of prosecution was the only solution.[47] Moreover, as was noted in chapter two, the test for the granting of a stay of prosecution was

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[44] *Ibid* para 4.

[45] Compare *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34F-I; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 19 (albeit in the context of whether a documentary offended the *sub judice* rule or constituted contempt of court).

[46] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 2 SACR 113 (CC) para 13; *S v Steyn* 2001 1 SACR 25 (CC) para 13; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 111; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43; *S v Radebe* 1973 1 SA 796 (A) 812H.

[47] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 30G-H.

whether the accused suffered significant and irreparable trial related prejudice, and not *speculative* prejudice; there had to be a showing by the Applicant of actual trial related prejudice as opposed to vague or conclusory allegations of prejudice - trial related prejudice does not mean prejudice in the air. Whether there was actual trial related prejudice is a matter that could only properly be determined by the trial court, steeped in the atmosphere of the trial. In the *Krion* pre-trial motion, it remained pure speculation whether the trial court would be biased or have a mind closed to the issues on account of, or be adversely influenced or affected by, the civil judgments.

Notwithstanding these considerations, the State argued in essence on the question of the impartiality of the trial court in the face of the adverse civil findings, that whether or not there was a real and substantial risk of partiality of the judge and assessors, if appointed, had to be weighed against the backdrop of the developed system of safeguards that have evolved to prevent just such a contingency. Only when these built-in mechanisms were inadequate to guarantee impartiality would the test be satisfied and a fair trial rendered impossible of attainment.[48] It was submitted that a judge, who is in a very different position to a juryman (though in no sense superhuman), would be able by his or her training and experience to put aside matters which were not evidence in the case, and to decide the case solely on the evidence adduced and submissions of counsel.[49] It was argued that whilst it is a fallacy to assume that trial judges cannot be affected by persistent outside information of a prejudicial nature, considering that they are mortals too with human frailties, only the remotest possibility existed of a judge, imbued with basic impartiality, legal training and the power of objective thought, being consciously or subconsciously influenced by extraneous matter.[50] The submission was moreover made, by analogy, that '[t]o accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition need[ed] merely to be stated to convince of its unsoundness.'[51] Thus, where the trier of fact would be a

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[48] *Ibid* 34H-I.
[49] *Ibid* 36H, 38C; Cleaver (1993) *SALJ* 533.
[50] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36E; *S v Chinamasa* 2001 1 SACR 278 (ZS) 298E.
[51] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36I-37A.

judge and not a jury, the argument that the civil judgments might influence the trial court could not be sustained on policy grounds without conceding that it would then be impossible to find an impartial judge to decide the criminal case.[52] This would mean in effect that there could be no parallel civil case instituted before the criminal case was finalised - an untenable proposition especially for victims or individuals wanting to claim damages or reparation, or for other interested parties, such as creditors having a legitimate claim in liquidation proceedings. The latter problem would be compounded by the fact that very often in complex commercial crime matters (with a vast volume and morass of evidence), it may take years, as it did in the *Krion* case, to investigate (for example, in obtaining a forensic audit report), with systemic challenges in the South African Police Service and the NPA, and to bring the trial to finality, with the very real possibility of an appeal also being lodged.

With reference to *Banana v Attorney-General*,[53] the State submitted that there were sufficient procedural safeguards or judicial mechanisms in place in South Africa's legal system to guarantee impartiality in the adjudication of the criminal trial and to rid the influence of prejudice. As discussed earlier in this thesis, these included (i) the oath of office of judicial officers to uphold and protect the Constitution and the human rights entrenched in it, and to administer justice without fear, favour or prejudice, in accordance with the Constitution and the law; (ii) the oath which assessors appointed by the judge would similarly take before the trial commences, to give a true verdict upon the issues to be tried, on the evidence placed before them; (iii) the instruction or reminders of the trial judge to the assessors that the case was to be decided solely on the evidence elicited at trial; (iv) the presumption of impartiality which requires cogent or convincing evidence to be rebutted; (v) the related presumption (*pro judice competentiae, scilicet et integritatis*)[54] that the judge and assessors would perform their bounden duty with integrity,[55] and determine the

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[52] Compare Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-135.

[53] 1999 1 BCLR 27 (ZS).

[54] *S v Radebe* 1973 1 SA 796 (A) 812F.

[55] In the Supreme Court of Canada decision of *R v Teskey* (2007) 220 CCC (3d) 1 paras 19-20 (Westlaw), it was observed that the presumption of judicial integrity encompasses the notion of impartiality; '[i]t encompasses the expectation that judges will strive to overcome personal bias and partiality and carry out the oath of their office to the best of their ability.' It was held that '[t]he presumption of integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption - and duty - of impartiality but also of legal knowledge [which means that] judges are presumed to know and act in accordance with their legal responsibilities'. (*Ibid* para 29 (Westlaw)). The foundation for the presumption of integrity is that every judicial officer is bound, both by his or her judicial oath and by the ethical

guilt or innocence of the accused free from extraneous considerations, and free from either prejudice against, or favour for, the accused; (vi) the nature of the criminal trial being to focus the minds of the judge and assessors on the evidence put before them rather than on the prior 'publicity', so to speak, adverse to the accused; (vii) the participation of the trial judge with the assessors in the fact-finding process; (viii) the ready access which the assessors would have to the trial judge and the ongoing guidance which he or she would be able to provide to them at all stages of the trial; (ix) the requirement that reasons would have to be given for the court's decision,[56] with the prospect of an appeal if such findings were not justified on the admissible evidence; (x) the right to challenge two persons chosen to be assessors at the trial or to seek the recusal of an assessor on good cause or on the basis of a reasonable apprehension of bias.

It was further argued by the State, as was considered above, that a judge is a trained judicial officer who would know that he or she would be required to decide every case that comes before him or her on the evidence adduced in that case, and that he or she would also know that a decision on the facts in one case is irrelevant in respect of any other case, and that he or she would have to confine him- or herself to the evidence produced in the case he or she was actually trying. Added to this, it was submitted that the civil judgments could not be used against the accused in the criminal case where the accused where not parties to the civil proceedings; the civil decisions were not evidence of the truth or correctness of the judgments, or, in other words, the civil findings or pronouncements were not evidence of the facts upon which they were based. Accordingly, since the parties in the criminal case were different to those in the civil proceedings, the criminal trial court would not be bound to the civil judgments on any question of fact. All questions of fact had to be tried afresh in the criminal proceedings on the basis of evidence produced and tested by the State and the defence and their respective arguments at trial, and where the State was required to prove its case beyond a reasonable doubt.

The State, in its Heads of Argument, moreover gave a comparative analysis pertaining to the analogous question of the impact of adverse pre-trial publicity on

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obligation incumbent on anyone who exercises a judicial function, to behave honourably, sincerely and impartially towards litigants and those who represent them. These obligations are the cornerstones of judicial integrity. (*Ibid* para 30 (Westlaw)).

[56] In *R v Teskey* supra para 19 (Westlaw), it was pointed out that in line with the presumption of judicial integrity, the reasons proffered by the trial judge in support of his or her decision are presumed to reflect the reasoning that led him or her to his or her decision.

the accused's right to be tried by an impartial court. It referred *inter alia* to the apposite Canadian decision of *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*,[57] as cited with approval in *Banana v Attorney-General*.[58] In *Phillips*, a Commissioner was appointed by the government of Nova Scotia to conduct a public inquiry into a mine disaster in which 26 miners were killed. The respondent mine managers were charged with violations of the Nova Scotia Occupational Health and Safety Act. Those charges were subsequently quashed, and the respondents were charged under the Criminal Code with manslaughter and criminal negligence causing death. They applied for a declaration that the Order in Council establishing the inquiry was *ultra vires* the province and that it infringed their rights under sections 7, 8 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The terms of the inquiry were declared to be *ultra vires* as they encroached upon the federal criminal law power. The Nova Scotia Court of Appeal allowed an appeal from that decision, but ordered that the public hearings of the inquiry be stayed pending the disposition of the criminal charges against the respondents. The Court of Appeal held that the right to silence of the respondents would be violated if they were compelled to testify at the inquiry and that, owing to the inevitable media coverage of the inquiry, the fair trial interests of the respondents would be violated if the inquiry were to hear any evidence which would implicate them in the criminal offences. The Commissioner and a union which represented the miners appealed to the Supreme Court of Canada against the decision of the Nova Scotia Court of Appeal that the public hearings of the inquiry be stayed pending the resolution of the criminal charges against the individual accused.

The Supreme Court of Canada made the following pertinent findings in *Phillips*, particularly as to the question of whether the pre-trial publicity in relation to the public inquiry would materially affect the impartiality of the trial court in the criminal case where the accused ultimately elected to be tried by a judge alone:

- In my view, an individual who has elected to be tried by judge alone cannot also claim that his fair trial rights have been breached by excessive pre-trial publicity… The process of electing the mode of trial is a voluntary exercise freely undertaken by the accused. It follows that an accused must accept all of the consequences flowing from his choice of mode of trial. One of these is that if trial by judge alone is selected it must be assumed that a trial judge trained to be objective and well-versed in the legal burden resting upon

[57] (1995) 98 CCC (3d) 20 (SCC).
[58] 1999 1 BCLR 27 (ZS) 30H, 34H, 36H.

the prosecution can readily disabuse him- or herself of the prejudicial effects of pre-trial publicity.[59]

- While these two respondents contend that they would suffer several general types of unfairness if the Inquiry were held prior to or concurrently with their trials, in my view the only serious threat to their s. 11(*d*) rights [every person charged with an offence has the right to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal] arises from the possibility that either their testimony at the Inquiry or the Commissioner's conclusions might be published, in whole or in part, before the completion of their trials. While such pre-trial publicity has the potential in some circumstances to prejudice an accused's right to a fair trial to the extent that it concerns information that would not otherwise be admissible against him or her at trial, it is not in every case that such prejudice will result. In fact, *assessing the potential prejudicial impact of pre-trial publicity is highly speculative*. Furthermore, *prejudice arising from pre-trial publicity can only be alleged where an accused is being tried by a judge and jury*. *If an accused is being tried by judge alone, pre-trial publicity is assumed not to prejudice his or her right to a fair trial*.[60]
- [I]mpartiality cannot be equated with ignorance of all the facts of the case.[61]
- Negative publicity does not, in itself, preclude a fair trial.[62]
- While I reach this conclusion based on the fact that [the respondents] are being tried before a judge alone, I note that even if they had not changed their original elections to be tried by a judge and jury I would have still reached the same conclusion. In my view, although an accused who is being tried before a judge and jury may be prejudiced by pre-trial publicity related to a public inquiry, it is only in the most extraordinary of circumstances that a stay of a public inquiry's proceedings should be issued to remedy such a potential violation of s. 11(*d*) of the *Charter*. This is for two reasons. First, *the risk of prejudice to an accused's fair trial rights from pre-trial publicity is highly speculative*. Consequently, it will be *extremely difficult* to prove such a prospective violation of s. 11(*d*) of the *Charter with a sufficient degree of probability to warrant the granting of a remedy.* Second, even if the potential violation of s. 11(*d*) is shown to be sufficiently likely to warrant a remedy, a stay of proceedings would not generally be the appropriate remedy.[63]
- As concern for the individual rights of the accused developed, it became preferable for jurors to be objective, and this was facilitated if they had no previous knowledge of the facts. However, even before the days of television and mass media coverage, this ideal was criticized by the American writer Mark Twain…:

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[59] (1995) 98 CCC (3d) 20 para 139 (Westlaw para 150).
[60] *Ibid* para 32 (Westlaw para 33) (Court's and my emphasis).
[61] *Ibid* para 132 (Westlaw para 143).
[62] *Ibid* para 129 (Westlaw para 140).
[63] *Ibid* para 34 (Westlaw para 35) (my emphasis), proceeding to explain the types of alternative remedies that could be fashioned to protect the accused's fair trial rights where a jury is the arbiter.

> … [when juries were first used] news could not travel fast, and hence [one] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try - but in our day of telegraph and newspapers [this] plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

The objective of finding twelve jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the *Charter* in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.

I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case. The confidence in the ability of jurors to accomplish their tasks has been put in this way…:

> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions… The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, *I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it.* If such were the case there would be no justification at all for the existence of juries...

The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially.[64]

The Supreme Court of Canada in *Phillips* moreover affirmed that in order to stay the public inquiry, it would had to have been shown that there was 'a real and substantial

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[64] *Ibid* paras 131-134 (Westlaw paras 142-145) (emphasis in the Court's judgment), again proceeding to note what other relief could be granted where procedural safeguards could not prevent juror bias.

risk', 'a high probability' or even a 'virtual certainty' of prejudice arising in the criminal proceedings if the stay was not granted: the essence of these tests was that before a court would restrain government action, it had to be satisfied that there was a '*very real likelihood*' that in the absence of the relief sought an individual's fundamental rights would be prejudiced.[65] Such a determination could not be made in the abstract: '[r]ather the proper approach should be a contextual one, which takes into account all the surrounding circumstances, including, for example, the nature of the right said to be threatened and *the extent to which the anticipated harm is susceptible of proof*.'[66] The Court also alluded to the fact that whether or not there was bias, or a reasonable apprehension of bias, on the part of the trial court as a result of the publicity relating to the public inquiry, could not be based on speculation, but would have to be assessed at the time of the criminal trial proceedings.[67] In all the premises, the Court held that the appeal should be allowed and the stay of the public inquiry hearings be set aside.

7.4 The findings of the Court on the application for a stay of prosecution

Ngoepe JP in the *Krion* pre-trial motion held that the application for a stay of prosecution was without merit. In effect, what the Applicant was contending is that once a civil case had been decided and certain findings made, a criminal prosecution in respect of the same conduct could not be allowed to proceed, as the accused would be prejudiced by the prior civil judgment against the accused. The premise of the application was that the trial judge in the criminal matter would be influenced by the pronouncements in the various civil cases, and therefore would fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality.[68] According to Ngoepe JP, there was no basis for this.[69] The Judge President explained that:[70]

> It is trite law that decisions by the one court are not binding on the other court; they are mere opinions; this is particularly so with regard to factual findings as *in casu*. Secondly, the standard of proof in criminal trials is higher than in civil trials. The applicant's submission

[65] *Ibid* paras 109-111 (Westlaw paras 120-122) (my emphasis).
[66] *Ibid* para 110 (Westlaw para 121) (my emphasis).
[67] *Ibid* para 134 (Westlaw para 145).
[68] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 8.
[69] *Ibid* para 8.
[70] *Ibid* para 8.

> could lead to absurdities. Not only would an accused person be absolved from criminal prosecution once a civil judgment has been handed down against him/her in respect of the same conduct, but the reverse would also have to occur: once a criminal conviction has been made against an accused person in respect of particular conduct, a subsequent civil trial in respect of the same conduct could likewise be deemed to be unfair to the accused (defendant) as a result of the perceived influence of the criminal verdict. This argument would make nonsense of the well established principle of our law that conduct can give rise to both civil and criminal liability, both of which are prosecutable against the perpetrator.

Ngoepe JP affirmed, endorsing *Danisa v British and Overseas Insurance Co Ltd*,[71] that: 'A Judge is a trained judicial officer and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the evidence produced in the case he is actually trying.'[72] Ngoepe JP added on this score that: 'The trial judge would also be aware that the State would still have to prove the facts required for the criminal conviction, despite the judgments in the civil matters.'[73]

Ngoepe JP further observed that the Applicant's submissions were 'incomprehensible', given the fact that his counsel submitted that the Applicant and his co-accused were not party to the civil cases in question and had not given anybody the authority to admit to any facts on their behalf.[74] The trial judge in the criminal case would therefore have known that the judgments in the civil cases could not be used against the accused in the criminal trial as the accused were not party to those civil proceedings.[75] Ngoepe JP remarked that one would have thought that the criminal trial would be one occasion where the accused would have the opportunity, if so advised, to state their own facts and cause the court to come to a finding different from any made without their input by the civil courts in question.[76] The Judge President pointed out that it was submitted for the Applicant that the pronouncements made in the civil cases were defamatory of the accused, as the pronouncements were not germane or relevant to the resolution of the cases then to be decided. If the pronouncements were indeed not relevant, it would mean that they were all *obiter dicta* and therefore even less binding or influential on the

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[71] 1960 1 SA 800 (D) 801F-G.
[72] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9.
[73] *Ibid* para 9, applying *R v Lechudi* 1945 AD 796 801.
[74] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 10.
[75] *Ibid* para 10.
[76] *Ibid* para 10.

subsequent criminal trial.[77] Ngoepe JP also held that the application was ill-conceived: an accused person could not apply for a permanent stay of prosecution on the ground that he or she was likely to be prejudiced by external factors, in this case pronouncements in civil matters. Such an argument would assume that the trial court would commit an irregularity by allowing itself to be unduly influenced by those factors.[78]

In the Judge President's view, the criminal trial had to proceed: if the accused were acquitted, that would of course be the end of the matter. If convicted, the accused would consider the motivation therefor, and then decide on what to do; it was not for nothing that presiding officers are compelled to give reasons for their verdicts.[79]

Ngoepe JP accordingly dismissed the application, ordering moreover that counsel for the Applicant was not entitled to the payment of any fees in connection with the application on account of the fact that the application was clearly baseless, was aimed at delaying the criminal trial, was an abuse of court process, and it was counsel who advised the Applicant to initiate the application because he believed that the Applicant's right to a fair trial had been violated by the pronouncements made in the various civil courts. Counsel was briefed by the Legal Aid Board, and thus taxpayers' money could not be abused in this manner.[80]

7.5 Evaluation and conclusion

The salient issue that fell to be determined by Ngoepe JP was whether there was a real and substantial risk that the court's impartiality in the adjudication of the criminal trial would be materially affected by the findings made by the civil courts against the accused. The question essentially was whether the criminal trial court would prejudge the guilt of the accused and fail to adjudicate in the trial objectively, with an open mind and with the necessary impartiality, on account of the civil judgments. According to Ngoepe JP, there was no basis for holding that that would be the case *in casu*. It is submitted that there was indeed no evidence to suggest that the criminal trial court would be biased or unduly influenced by the adverse findings

[77] *Ibid* para 10.
[78] *Ibid* para 11.
[79] *Ibid* para 11.
[80] *Ibid* paras 11-12.

against the accused made by the civil courts. The potential prejudicial impact of the civil judgments was highly speculative. Mere conclusory allegations were made by the Applicant in this regard. As no actual or definite trial related prejudice was shown by the Applicant, no substantive case was made out warranting a stay of prosecution. It is submitted that the criminal trial judge was best placed to assess the circumstances which existed and to decide whether the available procedures were sufficient to enable the court to reach its verdict with an impartial mind. In the criminal trial proceedings, it could be gauged whether the court may have been biased and a recusal application brought if there was a reasonable apprehension of bias. There is in general not an *a priori* answer to whether a trial will be fair or not.

While, as was noted earlier in this thesis, there is some debate as to whether even a judge can be expected to unbite the proverbial apple of knowledge and artificially empty his or her mind of outside or extraneous information of a prejudicial nature, or whether a judge can readily, or is better equipped than a jury to, disabuse his or her mind of matters not evidence in a case, a judge, by his or her training, experience and oath of office, would generally be able to *lay aside* or leave out of consideration (buite rekening laat) such information and decide a case on the admissible evidence. As was considered in chapters three, four and six, any concept of judicial impartiality is the ability to approach a case with an open mind and to be persuaded by the evidence and submissions of counsel, despite prior or outside knowledge. While the ideal is that a presiding officer in an accusatorial trial should enter the trial *tabula rasa* as to the adjudicative facts in dispute or the evidence that is to be presented by the parties, so as to prevent a prejudgment of the issues or the adjudication of the case with a closed mind, it may happen that the presiding officer may gain knowledge of certain facts of a case before trial, facts which later would have to be determined again at trial.[81] One considers, for example, the Commission of Inquiry hearings in respect of the Marikana police shooting and now presently State Capture: if criminal prosecutions are to follow from these hearings it is likely that the trial judicial officers would have been exposed, due to the public nature of the hearings, to the evidence adduced at the hearings and findings of the Commissions. One similarly thinks of the position in relation to a criminal prosecution and the Life Esidimeni Arbitration hearings, which were also

[81] *S v Mampie* 1980 3 SA 777 (NC) 778H: 'Dit gebeur nogal dikwels dat 'n Regter in die loop van sy werk van feite bewus word en kennis opdoen wat later in 'n verhoor weer ter sprake kom.'

public hearings and broadcast. What is critical in such situations is the trial judicial officer's ability or, at the very least, assumed capacity, from his or her training and experience, to sift the evidence adduced in the criminal trial and to only take into account in deciding the case what is actually relevant and admissible at trial, activity which is second nature to the judge.[82] Moreover, judicial officers would know that each case is to be decided on its own merits: he or she would know that every case which comes before him or her must be decided on the evidence adduced in that case, and that a decision on the facts in one matter is irrelevant in respect of any other case (such constituting a hearsay opinion in relation to the facts on which it is based), and that he or she must confine him- or herself to the evidence produced in the case he or she is actually trying. Judicial officers would generally also know that they cannot rely on evidence in one case to decide another case. They would know that they can only act on the evidence and on the arguments properly before them at trial and not on any information or knowledge which they receive from outside, that is, on extraneous information or knowledge that is independently acquired.

Nevertheless, the appearance of judicial impartiality is also fundamental. The parties to a case and the public must be satisfied that the trial court's decision is based upon the evidence laid before court in an admissible way only, and not upon extraneous information or knowledge or irrelevant and prejudicial material.[83] It is here that the requirement of a judicial officer having to give reasons for his or her decision is critical: for, by so doing, he or she '*gives proof*' that he or she has heard and considered the evidence and arguments that have been adduced before him or her on each side, and also that he or she has not taken extraneous considerations into account.[84] It is of course true that the judicial officer's decision may be correct even though he or she should give no reason for it or even give a wrong reason: 'but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason'; and that can only be seen, if the judge him- or herself states his or her reasons.[85] Impartiality in adjudication is ultimately gauged by the reasons for the decision.[86] While one cannot always gauge the extent of the influence which extraneous information may

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[82] *Ibid* 779D-E.
[83] Compare Snyman *Criminal Law* 321.
[84] A Denning *The Road to Justice* (1955) 29 (my emphasis).
[85] *Ibid* 29.
[86] Malan (2014) *Potchefstroom Electronic Law Journal* 1999.

have on the subconscious mind of the presiding judicial officer (and/or, where applicable, his or her assessors), the furnishing of reasons for a verdict, as seen in chapter four, does bring a level of transparency and accountability to the decision-making process and may limit the extent of such influence. And no appeal or review can properly be determined unless the appellate or review court knows the reasons for the decision of the lower court.[87] From a reasoned verdict it can be determined whether the findings of the trial court are justified on the admissible evidence.[88] Ngoepe JP rightly alluded to this crucial aspect in his judgment on the *Krion* pre-trial motion, in, that is, his overall assessment of whether the criminal trial had to proceed despite the impugned civil findings.[89] From a record of the proceedings and the evidence adduced at trial, it can be objectively assessed firstly, whether the guilt of the accused was established beyond a reasonable doubt, and secondly, whether the presiding officer at trial was in any way influenced by extraneous knowledge or irrelevant and prejudicial material.[90] In this sense, an appeal or review system is also an indispensable procedural safeguard that is designed to protect the accused's fundamental right to a fair trial and to ensure a just and equitable outcome.[91]

Moreover, during trial proceedings themselves, a recusal application can be lodged if any reasonable apprehension is entertained that the presiding officer and/or assessors may be biased or may not bring an impartial mind to bear on the adjudication of the case, possibly from statements made by the judicial officer or his or her conduct during the trial or from the line or manner and extent of questioning by the court of witnesses and/or the accused; that is to say, if the independence and impartiality of the trial court is not manifest to all those who are concerned in the trial and its outcome.

In the *Krion* criminal trial, the matter was presided over by a judge sitting with two assessors. The trial Court gave a unanimous judgment on the merits of the trial. The Court delivered a 628-page judgment, comprising (i) a detailed summary of the plethora of evidence adduced by the State and defence over a period of approximately nine months, (ii) a detailed evaluation of the evidence and (iii) a detailed discussion or assessment, on a conspectus of all the evidence, of whether

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[87] Denning *The Road to Justice* 29.
[88] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38I.
[89] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 11.
[90] Compare, for example, *S v Maputle and Another* 2003 2 SACR 15 (SCA) para 14.
[91] See, for example, Cameron *Justice* 185.

the State had proved the 218 683 charges preferred against the accused.[92] It is submitted that it cannot be seen from the Court's judgment that the Court was unduly influenced by the civil judgments in arriving at its decision; in other words, it cannot be gleaned that the Court's impartiality in the adjudication of the case was materially affected by the findings against the accused contained in the civil judgments. Indeed, the Court did not refer in its judgment to the civil decisions in reaching its verdict. The trial Court's judgment shows that the Court's decision was based on the evidence presented at trial and the arguments of counsel for the State and the defence, likewise with regard to sentence. The accused were also acquitted on a large number of counts, especially Marietjie Prinsloo's co-accused where their involvement or complicitness in the commission of the crimes was not proven.

The case moreover went on a full appeal against conviction and sentence in the Supreme Court of Appeal, where the latter Court gave a comprehensive, 112-page judgment.[93] From the appeal record there was no indication that the trial Court was biased or unduly influenced in any way in the adjudication of the case by the civil judgments. It was also never claimed or suggested by counsel on appeal that the trial Court did not bring an objective and impartial mind to bear on the adjudication of the case. It is submitted that objectively it could not be said that the trial Court did not with an open mind make its findings on the merits. The same can be said for the Supreme Court of Appeal, which is clearly evident from its judgment. Indeed, it is submitted that none of the Applicant's averments or assertions as to impartial decision-making at trial and by the Appellate Court being materially affected by the civil judgments, ever materialised. It is apparent that both Courts dealt with all the issues based on the evidence presented and submissions of counsel for the State and the defence, as well as the applicable law. The accused had a fair trial both in the trial proceedings and on appeal. There were errors as to certain of the counts that were corrected on appeal, but none of these could be attributed to bias or the undue influence of subconscious or subliminal factors. Were it so, this would likely have emerged and pertinently dealt with on appeal. Justice could be seen to be done from the judgments of both the trial Court and the Supreme Court of Appeal.

Although Ngoepe JP did not deal with this aspect in his judgment in the *Krion* pre-trial motion, and while the assumption that trial judges cannot be affected by

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[92] *S v Prinsloo en Ander* GNP 08-06-2010 case no CC384/2006.
[93] *S v Prinsloo and Others* 2016 2 SACR 25 (SCA).

outside information of a prejudicial nature is questionable, the question of a real and substantial risk of bias on the part of the judge and assessors also had to be weighed against the backdrop of the developed system of other safeguards (besides the requirement of a reasoned verdict, and the appeal or review system) that have evolved to prevent such a contingency.[94] It was only when these mechanisms were inadequate to guarantee impartiality in the face of the civil judgments that the test for the granting of a stay of prosecution would have been satisfied and a fair trial accordingly rendered impossible of attainment.[95] These safeguards or judicial mechanisms have been delineated in this thesis; most notably, the nature of the accusatorial process, whereby the trial Court would, and did, play a relatively passive role and where it would be, and was, left to the State and the defence to present their evidence and indeed, to focus the Court's mind on such rather than prejudicial extraneous information. This would, and indeed did serve to, enhance the principle of impartiality in the adjudication of the case.[96] Added to this, one had the oath of office of the trial judge and the oath taken by the assessors, which required the dispensing of justice without fear, favour or prejudice and in accordance with the Constitution and the law, as well as the rendering of a true verdict upon the issues to be tried and on the evidence placed before them. The presiding judicial officer was moreover required, in adjudicating the case, to act within a framework of specific judicial standards relating to the core judicial values of independence, impartiality, integrity, propriety, equality and competence and diligence.[97] The presumption of impartiality and integrity also applied, which is more than a pious hope.[98]

Ultimately, it is not possible to remove a judicial officer from all outside influences.[99] The key question is whether the judicial officer, nevertheless, comes to court with an open mind as to the strengths and weaknesses of the different parties' cases in relation to the issues raised in court.[100] Such is critical in decision-making.

In the circumstances, it is submitted that Ngoepe JP did not misdirect himself in dismissing the application for a stay of prosecution *in casu*, having regard also to

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[94] Compare *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34H-I.
[95] *Ibid* 34I.
[96] PJ Schwikkard & SE van der Merwe 'Judicial Notice' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 515 515 (para 27 1).
[97] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) paras 105-114.
[98] *Tyson v Trigg* 50 F.3d 436 439 (1995).
[99] Malleson *The New Judiciary* 65.
[100] *Ibid* 65.

the serious injustice and absurdity that would have arisen had the State been prevented, because of findings in parallel civil proceedings, from fulfilling its constitutional mandate or obligation to prosecute very serious crimes that had a devastating effect on thousands of investors. As Ngoepe JP observed, it would have made 'nonsense' of the well-established principle of our law that conduct can give rise to both civil and criminal liability, both of which are prosecutable against the perpetrator.[101]

[101] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 8.

CHAPTER 8

CONCLUSIONS

The notion of impartiality of the judiciary is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties.[1]

8.1 General remarks

In relation to criminal cases, it may be said that there are four broad or principal forms of impugnable prejudice or bias on the part of the arbiter: (i) interest prejudice (having a stake or interest in the outcome of a case); (ii) specific prejudice (holding an attitude or belief about a specific case at trial that would prevent the arbiter from deciding guilt or innocence with an impartial or open mind - such an attitude or belief could arise from personal knowledge about the case at hand, publicity about the matter from the mass media, or informal discussion and rumour about the case among members of the community); (iii) generic or general prejudice that involves the transferring of attitudes or beliefs about a case or its participants as a result of the arbiter's pre-existing beliefs, or stereotyping, of the accused, the victim or complainant, or the crime itself, such that the case is not decided impartially (racial or ethnic prejudice is one of the oldest recognised forms of generic prejudice - a person is judged on his or her identity as a member of a group, rather than on the specific facts brought out in the trial evidence); and (iv) conformity prejudice, which exists when the arbiter perceives that there is such a strong community interest in a particular outcome of a trial that he or she is influenced in reaching a verdict by the community's feelings rather than an impartial personal evaluation of the trial evidence.[2]

In this thesis, the focus has been on the question of specific prejudice, whether, that is, adverse pre-trial publicity appertaining a criminal case is likely to

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[1] Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association *Professional Training Series No. 9: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 139.

[2] N Vidmar 'The Canadian Criminal Jury: Searching for a Middle Ground' (1999) 62(2) *Law and Contemporary Problems* 141 155-156. See also Hill (2001) *SAJHR* 567 n 23.

materially affect the impartiality of a court in the adjudication of the case or to have a biasing effect on the outcome of the trial in South Africa's legal system. The question has been explored whether a criminal trial court, comprised of a judge or magistrate sitting alone or with assessors, is likely, on account of media coverage of a case in advance of trial, to be biased in the adjudication of the case, in other words, whether the court as a result of pre-trial publicity is likely to prejudge the issues or to be predisposed to a particular result and to adjudicate on the case with a closed mind - a mind that is not open to persuasion by the evidence and submissions of the parties presented at trial. The focus has also been, with the *Krion* case as a case study, on the question of whether prior adverse findings contained in a judgment in parallel judicial proceedings arising from the same facts as a pending criminal case, which findings impute, directly or indirectly, criminal conduct or criminal liability to the accused awaiting trial, are similarly likely to materially affect the impartiality of the criminal court in the adjudication of the case.

It is so that there is in general not an *a priori* answer to the question of whether a particular trial would be fair or not.[3] Fairness cannot be determined in a vacuum, but is an issue to be decided upon the concrete facts of each case.[4] One must also guard against entering the realm of pure speculation. For these reasons, the above-mentioned main research questions have been explored against the backdrop of procedural safeguards or judicial mechanisms that have evolved and are designed to guarantee impartiality in the adjudication of a criminal trial and to rid the influence of prejudice in the face of pre-trial publicity. In this regard, salient basic contours of the typical South African criminal trial have been considered in this thesis, as it is important to understand how such a trial functions and what its structural demands are, in examining whether pre-trial publicity is likely to unduly influence it or bias trial outcomes. It is submitted that from such an analysis and review of the pertinent authorities, it is possible to inductively arrive at an overall principle or notion as to whether pre-trial publicity is in general likely to materially affect the impartiality of a trial court in the adjudication of a case. In light of the *Krion* case study and the analogous position of pre-trial publicity, it is submitted that it is similarly possible to inductively arrive at a general principle as to whether adverse

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[3] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4.

[4] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 2 SACR 113 (CC) para 13; *S v Steyn* 2001 1 SACR 25 (CC) para 13; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 111. See also appositely, *S v Radebe* 1973 1 SA 796 (A) 812H.

findings against an accused made in an earlier judgment in parallel proceedings, are likely to materially affect the impartiality of the trial court in the pending criminal case.

8.2 The vital importance of an adversary system as a procedural safeguard

Particular emphasis has been laid in this thesis on adversarial or accusatorial process, as a defining feature of criminal justice in South Africa, and indeed, as a fundamental element and mainstay of an accused's right to a fair trial under the South African Constitution.[5] While the adversary system may not be the best means for arriving at the truth at trial given that each party to the dispute may be driven by a desire to win or to obtain a result in his or her favour at the expense of determining the truth which can be elusive, and while the adversary system can only function optimally if there is equality of arms, adversarial or accusatorial process does have the following salient benefits that would aid in eliminating the influence of prejudicial pre-trial publicity, which benefits have been delineated in chapters three and six:

8.2.1 The focus is more on procedural fairness and maintaining impartiality in the process of adjudication

A greater premium is placed on procedural fairness, and indeed the impartiality of the arbiter, than establishing the truth at trial.[6] One commentator opines that adversariness only serves the purpose of impartiality and is often incompatible with truth-finding and substantive justice.[7] The essence of a fair trial lies not in the correctness of the decision made, but in the procedures by which the correctness of the decision is guaranteed.[8] It is generally considered more important to retain the integrity of the system of justice than to ensure the punishment of even the most heinous offender.[9] Ultimately, a verdict of guilty cannot be returned if the court concludes that the trial, for whatever reason, has not been a fair one.[10] A fair trial is seen as the goal of criminal justice.[11] In the words of the United States Supreme

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[5] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 246; Steytler *Constitutional Criminal Procedure* 215.
[6] See, for example, Damaška *The Faces of Justice and State Authority* 135-136.
[7] Zupančič (1982) *Journal of Contemporary Law* 41.
[8] Steytler *The Undefended Accused on Trial* 6.
[9] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 32E.
[10] *S v Nkabinde* 1998 8 BCLR 996 (N) 1001H.
[11] *R v Lifchus* (1997) 118 CCC (3d) 1 (SCC) para 13 (Westlaw).

Court: 'Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.'[12] For in the struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. One can win the struggle for a just order only through means that have moral authority.[13]

8.2.2 The advantages of party control of litigation

In adversarial process, it is essentially the parties who are in control of the litigation. They have the main responsibility for gathering and presenting the evidence to court. It is basically the litigants who must be heard and not the judicial officer. The court is primarily dependent on the evidence and submissions presented by the parties in reaching its decision on the case. It would be wrong for a court to rely for its decision on matters not put before it by the litigants either in evidence or in oral or written submissions. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel. The court's decision must be confined to aspects traversed by the parties in evidence and argument, and not on extraneous matters.[14] Adversarial process, indeed, presupposes that the court's decision will rest solely on the evidence and arguments which the parties properly present.[15]

Such a trial system is a significant factor influencing judicial decision-making and vital in the context of pre-trial publicity, in that the parties would naturally focus the mind of the court on the evidence put before it rather than on prior publicity that may be detrimental or prejudicial to an accused.

The trial court's vision is effectively limited to that which the parties want the court to see. The presiding officer may not forge his or her own path to understanding, unlike the case in inquisitorial systems. The adversary system affords the decision-maker the advantage of seeing what each litigant believes to be

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[12] *Brady v Maryland* 373 US 83 87 (1963).
[13] *S v Tandwa and Others* 2008 1 SACR 613 (SCA) para 121.
[14] *Kauesa v Minister of Home Affairs and Others* 1996 4 SA 965 (NmS) 973H-974A. See also *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) paras 15, 19, noting that the function of a court is to adjudicate the issues between the parties and not extraneous issues.
[15] Zacharias (1991) *Vanderbilt Law Review* 88.

his or her consequential proof. 'It also focuses the litigation upon the questions of greatest importance to the parties, making more likely a decision tailored to their needs.'[16]

When the litigants direct the proceedings, there is little opportunity for the presiding officer to pursue his or her own agenda or to act on his or her biases.[17] And because the presiding officer seldom takes the lead in conducting the proceedings, he or she is unlikely to appear to be partisan or to become embroiled in the contest. His or her detachment '*preserves the appearance of fairness as well as fairness itself*.'[18]

The prosecutor and the defence in an accusatory trial also have a far greater opportunity to influence the court's decision, than in inquisitorial systems, since the decision is to be based primarily on the evidence and argument advanced by them as the participating parties.[19] The basis of the adversary system is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments.[20] Adjudication is defined as a process of decision characterised by a particular form of participation accorded to the affected party, that of presenting proofs and arguments for a decision in his or her favour.[21] Whatever protects and enhances the effectiveness of that participation, advances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity. Accordingly, any bias on the part of the adjudicator 'constitutes an obvious impairment of the interested party's participation through presenting proofs and arguments.'[22]

8.2.3 Impartiality presupposes the passivity of the adjudicator, which in turn is created or produced by an adversarial presentation of the facts by two opposing parties

It is in the nature of accusatorial process that judicial officers should play a relatively passive role and be aloof or detached from the proceedings. This serves to promote

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[16] Landsman *The Adversary System* 4.
[17] *Ibid* 44.
[18] *Ibid* 44-45 (my emphasis).
[19] Steytler *The Undefended Accused on Trial* 6.
[20] *Ibid* 6, with reference to Fuller 'The Adversary System' in *Talks on American Law* 41.
[21] Fuller (1963) *Wisconsin Law Review* 19, 30.
[22] *Ibid* 19.

or 'enhance the principle of impartiality.'[23] The arbiter is impartial by definition as he or she is not a party in the dispute; hence, 'withdrawal from direct involvement to a standpoint outside the game is a condition *sine qua non* of all judgment.'[24]

The presiding officer remains passive because the presentation of all the information needed for a decision is done primarily by the procedural opponents or opposing parties and because the nature of the process is such that the parties seek to carry their respective evidential burdens in direct proportion to the persuasiveness of the other party's case.[25] In a criminal case, moreover, it is the prosecution which bears the onus of proof in establishing the guilt of an accused beyond a reasonable doubt – the party who alleges must prove his or her case.

Judicial impartiality presupposes the passivity of the arbiter: '[i]mpartiality is only possible in an interaction of two conflicting partialities.'[26] Without conflict there is no adjudication, and without the two partialities of the dispute there is no impartiality of the adjudicator; the notion of an impartial attitude willing to consider all the information submitted by both parties is relevant only in juxtaposition to the partiality of the two opponents.[27]

The judicial officer cannot him- or herself actively investigate the facts at trial because active investigation requires at least a prior tentative opinion - one cannot investigate unless one has a hypothesis about what happened in a particular case.[28] 'No one committed to a hypothesis can be impartial.'[29] In the adversary process of adjudication, 'the adjudicator has no need to form a hypothesis in order to investigate because the parties themselves incarnate the respective hypotheses about the past event.'[30] Being passive enables the arbiter to remain impartial until the decision is made.[31] Being free to remain passive preserves the possibility of vacillation or ambivalence between juxtaposed hypotheses of opposing parties for much longer.[32] Impartiality in the way of arriving at decisions or in the process of adjudication (the decision itself cannot be impartial), must entail the willingness and indeed the ability

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[23] Schwikkard & Van der Merwe 'Judicial Notice' in *Principles of Evidence* 515 (para 27 1).
[24] Arendt *Lectures on Kant's Political Philosophy* 55.
[25] See, for instance, Zupančič (1982) *Journal of Contemporary Law* 80.
[26] *Ibid* 42, 82.
[27] *Ibid* 79.
[28] *Ibid* 70.
[29] *Ibid* 71.
[30] *Ibid* 75.
[31] *Ibid* 75.
[32] *Ibid* 75.

of the arbiter to postpone or suspend the final formation of his or her opinion until the parties have 'had their day in court' and have presented all the information that they consider relevant in the context of adjudication.[33] It is essential that the opinion-formation in the process of adjudication be postponed or suspended for as long as possible: '[t]his increases the chances that everything presented by the parties during the process of adjudication will, in fact, form the basis of the final opinion-decision by the adjudicator. The taking into account of everything presented by the parties is an essential element of the idea of impartiality in an adversary structure of decision-making.'[34]

8.2.4 The dialectical process of an adversary trial keeps the arbiter undecided until all the evidence and arguments have been presented by the parties, thereby promoting judicial impartiality in the process of adjudication

A continuous dialectical process of thesis and antithesis or an adversary point-counterpoint method of proceeding (where dispute is introduced at each stage of the proceedings, for example, through cross-examination and counter-arguments), promotes unprejudiced adjudication – it tends to keep trial courts uncommitted or undecided until all the tested evidence is in from both parties, which is a fundamental element of impartiality in adjudication.[35] The focused nature of the adversarial contest provides for two clearly articulated incompatible assertions which in the ideal case reflect the incompatibility of parties' interests. This helps the judicial officer maintain his or her objectivity because he or she can remain not only uncommitted (passive) but also actively ambivalent (due to constant alternation of the two mutually incompatible hypotheses). The longer the judicial officer is undecided, the longer he or she is open to the incoming information, and thus is in this sense unprejudiced.[36] Psychology of decision-making suggests that 'it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand.'[37] The adversary system, then, seems to be the only effective means for combatting the natural

[33] *Ibid* 70.
[34] *Ibid* 71.
[35] Zacharias (1991) *Vanderbilt Law Review* 54; Zupančič (2003) *European Journal of Law Reform* 95 n 162; Zupančič (1982) *Journal of Contemporary Law* 70, 71-72, 73, 79-80, 82, 83-84, 85.
[36] Zupančič (1982) *Journal of Contemporary Law* 49.
[37] Hazard *Ethics in the Practice of Law* 121; Zacharias (1991) *Vanderbilt Law Review* 54 n 40.

human tendency of judging too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it.[38]

8.2.5 Adversarial process leads to an enlargement of mind, thereby promoting impartial judgment

Genuine adjudication, which attests to the impartiality and party detachment of the adjudicator, is undermined where the court plays an active role in the development of the evidence at trial. Taking the different perspectives of the parties into account, rather than being locked into one perspective where the presiding officer bears the responsibility of adducing all the evidence, helps to achieve an enlargement of mind, which in turn makes impartial judgment and the appearance or display of impartiality possible.

8.2.6 The ideal position of the judicial officer entering a trial *tabula rasa* as to the evidentiary facts

Generally, the presiding officer would enter an adversarial criminal trial *tabula rasa* as to the adjudicative or evidentiary facts of the case or the evidence that is to be presented by the parties. This is by reason of the fact that the presiding officer does not investigate and gather the evidence before trial and does not have access to the police case docket, which is essentially the prosecutor's brief, as it were. Such a position of *tabula rasa* promotes or enhances impartiality on the part of the trial court in that it eliminates or helps to reduce the risk of a prejudgment of the issues and confirmation bias where the adjudicator is more receptive to information or evidence confirming his or her preconceptions or prior beliefs or early tentative hypotheses formed about the case and its outcome, than to evidence which clashes with them. The adversary system seeks to 'unbias' the trial court by requiring two zealous presentations of the facts by the parties to the dispute; it seeks to prohibit biasing evidence from being presented to the judicial officer prior to a judicial proceeding, which could cause him or her to make up his or her mind before the hearing even starts.[39] However, facts of a case or evidentiary materials that are available to the

[38] Fuller 'The Adversary System' in *Talks on American Law* 40.
[39] See, for example, Zwier & Barney (2012) *Emory International Law Review* 208.

public at large through the media, do not generally disqualify a judicial officer from presiding in a case – second-hand media reports on evidentiary facts in relation to a pending case are often highly speculative and inaccurate. The position is different where the judicial officer has direct access to evidence contained in a case docket before trial, which is likely to lead him or her to prejudge the issues or to see the case from the prosecutor's point of view before the trial commences.

8.3 Further salient procedural safeguards and judicial mechanisms

Other pertinent safeguards or judicial mechanisms have also been looked at in this thesis against which the main research questions are to be assessed, namely:

8.3.1 A trial by a judicial officer

An accused is not tried by a jury, but by a judicial officer, who by training is generally unlikely, or less likely than lay adjudicators, to be influenced by most media reports and comments on pending proceedings - a statement outside of court would rarely affect the outcome of a case in a non-jury system.[40] The task of sifting and evaluating evidence in the decision-making process and only taking into account that which is actually relevant and admissible, disregarding, that is, irrelevant and inadmissible material, rests upon a judicial officer's shoulders virtually on a daily basis.[41] The presiding officer is trained for such a task and it is generally, as it were, second nature to him or her.[42] In this respect, a judicial officer is in a different position from that of an ordinary juryman because a judicial officer is trained to discriminate between various facts all within his or her knowledge, to apply some and to reject others as having no bearing upon the matter to be decided.[43] Although in no sense superhuman, a judicial officer is trained and generally experienced in carrying out the often difficult task of fairly determining where the truth may lie in a

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[40] See Dugard (1972) *SALJ* 278; Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 15-16; De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 269-271; Waye (2003) *Melbourne University Law Review* 427; Cleaver (1993) *SALJ* 533-534; Hill (2001) *SAJHR* 566-567; Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) para 32 (Westlaw para 33).

[41] *S v Mampie* 1980 3 SA 777 (NC) 779D-E.

[42] *Ibid* 779E.

[43] *Khan v Koch NO* 1970 2 SA 403 (R) 404E-F, citing *R v Essa* 1922 AD 241 246-247.

welter or morass of contradictory evidence, in other words, of weighing and assessing evidence and drawing inferences from the evidence.[44] There is also a recognised presumption of judicial impartiality, which is more than a pious hope.[45] Judicial officers must moreover act in line with their oath of office, in terms whereof presiding officers are required to adjudicate on the cases that come before them without fear, favour or prejudice and in accordance with the Constitution and the law.

8.3.2 Giving reasons for a decision

One commentator observes that the 'main advantage' of a trial by a judicial officer appears to be that he or she is required to give reasons for his or her decision.[46] It was seen in chapter four that where the judicial officer also sits with assessors, reasons for the decision of the court must be given; even in the event of a difference of opinion, the judicial officer must give the reasons for the minority decision, or if the judicial officer sits with only one assessor, the decision of such assessor. This is not the case with juries, which reach their verdicts in secret. While miscarriages of justice do still occur despite the giving of reasons for a verdict, and while judicial bias can be disguised in a judgment, it has nevertheless been shown and emphasised in this thesis that the requirement of a reasoned verdict generally brings a level of transparency and accountability to the decision-making process; complements the fairness of a trial and facilitates an appeal or review process;[47] enables one to objectively determine whether a decision is based on any prejudice, error or extraneous matter, including pre-trial publicity; encourages rational or deliberative decision-making in a traditional and more normative sense because it allows depth of review and recourse to decisional tools, where precedent is followed and established evidential rules and principles are applied with regard to the admissibility and evaluation or weighing of evidence and the assessment of the guilt or innocence of an accused against the required burden and standard of proof; reduces the risk of irrelevant or otherwise inadmissible material being taken into account in the decision; safeguards against abuse by the court; acts as a safeguard against departures from

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[44] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 40.
[45] *Tyson v Trigg* 50 F.3d 436 439 (1995), per Posner CJ.
[46] De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 271.
[47] *Ibid* 271.

impartiality; helps to prevent a decision from being unduly influenced by improper intuitive or subconscious factors, or by any bias or prejudice that would not otherwise come to light; gives effect to the maxim that justice must be seen to be done; provides some assurance to the parties and the public that the trial court gave due consideration to the evidence and facts of the matter and relevant legal principles, and did not act arbitrarily in reaching its decision. It was observed in chapter four that a former Justice of the Constitutional Court, John Didcott, once said, with reference to the difficulty he had with the jury system, that '"to entrust anyone with the power to make a decision affecting someone else's liberty or livelihood or property, and then to allow him to give no reasons for his decision, is a highly dangerous thing to do. It is licence for a decision influenced by bias or prejudice that would never come to light."'[48] PJ Schwikkard points out that '[i]t is the requirement in a unitary court that the fact finder must give reasons for his or her decisions that acts as a safeguard against departures from impartiality. This would not hold true for a bifurcated court structure in which jurors are not required to give reasons for their findings.'[49] Moreover, the very essence of judicial accountability lies in the duty of a presiding officer to explain, legitimate and justify a decision.[50]

It has been noted in this thesis that whilst the notion that only the remotest possibility exists of judicial officers, imbued with basic impartiality and by virtue of their training, oath of office and experience, being consciously or subconsciously influenced by extraneous matter, perhaps overstates the position or may be over-sanguine, the fact that they are required to furnish reasons for their decisions 'at least limits the extent to which extraneous matters influence these decisions.'[51] Certain commentators, with regard to empirical studies on judicial reasoning and decision-making, where it is suggested that judges are prone to make intuitive decisions, opine that giving reasons for a decision may encourage the judicial officer to be more deliberative in the decision.[52] As justice is seen to be done in a trial court's reasons for its judgment (thereby in part giving effect to the open justice principle), not only can one in general see whether a court was unduly influenced or

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[48] Kahn (1993) *SALJ* 330.
[49] Schwikkard *Possibilities of convergence* 27.
[50] Malleson *The New Judiciary* 38.
[51] Hill (2001) *SAJHR* 567, commenting on *S v Chinamasa* 2001 1 SACR 278 (ZS) 298E (see also *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36E).
[52] Guthrie, Rachlinski & Wistrich (2007) *Cornell Law Review* 36-37. See also in this regard, Gravett (2017) *SALJ* 76.

affected by outside matters, but also a reasoned verdict may be the ultimate means of gauging whether the court approached the adjudication of a case with an impartial or open mind and objectively - it can at the very least be seen whether the trial court's findings are justified on the evidence adduced. 'A reasoned decision allows for close scrutiny of the conclusions reached in view of the evidence presented and the influence of irregularities on a decision are more likely to be detected than in the case of a finding reached in secrecy.'[53]

8.3.3 Assessors not in the same position as juries

It was considered in chapter four that assessors are in a fundamentally different position to juries; they are members of the trial court and determine the questions of fact with the judicial officer and their reasoning is made public.[54] Upon conclusion of the trial, the judicial officer and assessors retire to the judicial officer's chambers and deliberate together on the guilt or innocence of the accused.[55] The assessors have ready access to the trial judicial officer, who is able at all stages of the trial to provide ongoing guidance to them.[56] Assessors, unlike jurors, 'are under constant and immediate judicial guidance in the sense that a judge (or magistrate) and the assessors involved in the trial have joint deliberations in reaching their respective verdicts. During these deliberations the presiding judicial officer can and must draw the attention of lay assessors to certain rules which govern the evaluation of evidence.'[57] In the present context, both the prosecutor and the defence and the presiding judicial officer would draw the assessors' attention away from any pre-trial publicity detrimental or prejudicial to the accused and would focus their minds on the evidence adduced at trial.

8.3.4 Rules governing decision-making enhance impartial adjudication

The requirement that court decisions must be based on predetermined normative premises, that is, on established rules, principles or precedents, rather than a

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[53] *S v Jaipal* 2005 1 SACR 215 (CC) para 45.
[54] *Ibid* para 45. See also *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37E-F.
[55] De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 275. See also Richings (1976) *The Criminal Law Review* 113.
[56] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38H.
[57] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 16 (para 1 6).

subjective belief or *intime conviction* present in inquisitorial systems, helps to reduce the possibility of bias or partiality in judging. Such rules contribute to the drawing of lines between relevant and irrelevant factors in decision-making. Conceptions of impartiality are thereby given an institutional anchorage.[58]

8.3.5 Judicial training

Judicial training and continuing education can promote or facilitate impartiality in adjudication and can teach judicial officers how to properly adjudicate on trial matters and to avoid any underlying biases affecting their decisions; after all, being made aware that one's judgment may be affected by unconscious biases and preconceptions, can go a long way to eliminating such from the judicial process. The judicial officer's fact-finding ability and exercise of discretion can be enhanced through training. Judicial officers can be taught what intuitive or subconscious factors are prejudicial to the decision-making process. In the present context, judicial officers can also be taught how to appropriately adjudicate on trial matters in the face of extensive and adverse pre-trial publicity.

8.3.6 Legal representation

Legal representation for the parties is an important controlling mechanism of the judicial authority; it is 'an important factor in the institutional safeguards of judicial impartiality.'[59]

8.3.7 A trial is a public event

The open court or open justice principle and the related publicity of trial proceedings guarantee that justice is seen to be done and that courts are responsive, open and accountable. They are the means whereby the public may see whether judicial officers are independent and impartial, whether their decisions are rational and not arbitrary, whether the court's decision is justifiable on the evidence adduced, and whether the accused overall receives a fair trial.

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[58] Eckhoff (1965) *Scandinavian Studies in Law* 17-18.
[59] *Ibid* 41. See also Labuschagne (1993) *De Jure* 356.

8.3.8 The oral presentation of the respective cases for the parties

It has been observed in chapters four and six that the primacy of orality in accusatorial process is a vital mechanism for enabling maximum or optimal participation by the parties in the decision-making process, and it provides for judicial transparency and aids in unbiasing the court and preventing a prejudgment of the issues by requiring two zealous presentations of the facts.

8.3.9 The opening address by the prosecutor and closing arguments by the prosecution and the defence in criminal cases

It has been considered that the opening address by the prosecutor and the closing arguments by counsel for the respective parties are important means of focusing the trial court's mind on the pertinent issues and evidence and diverting the court's attention away from pre-trial publicity. The closing address on the merits of the case is a necessary final act of participation by the parties in the decision-making process, whereby the parties seek to influence the trial court's decision.

8.3.10 Observing the *audi alteram partem* rule and avoiding an inquisitorial type proceeding

Judicial impartiality is displayed when both parties at trial are afforded equal opportunity of producing evidence and arguing their respective cases. Thus, the appearance of impartiality, or impartiality which is manifest to all those concerned in the trial, is facilitated when the investigation of the facts and clarification of the issues are left to the parties; any initiative on the part of the court in this regard, to the advantage or disadvantage of a party, or the taking over of a case for a party or the taking over of the questioning of witnesses and/or the accused or undue judicial intervention will be interpreted as prejudice.[60]

8.3.11 The appeal or review system

As noted in chapter six, the appeal or review system is also a vital safeguard aimed at protecting an accused from a biased or unjust or erroneous decision.[61]

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[60] Eckhoff (1965) *Scandinavian Studies in Law* 13-14, 40-41.
[61] See, for example, Cameron *Justice* 185.

8.4 The unlikely influence of pre-trial publicity on the adjudication of a case

It cannot be denied that presiding officers may be affected by outside information of a prejudicial nature, and, as some empirical studies would suggest, that even trained judicial officers may find it difficult to ignore or disregard prejudicial inadmissible information or evidence that they may be exposed to. However, in light of the above-mentioned procedural safeguards and judicial mechanisms that are in place in South Africa's adversarial or accusatorial trial system, it is submitted that it will generally be unlikely that such contingencies would arise. This is reinforced by the fact, as has been observed in this thesis, that adversarial process creates a presumption of judicial impartiality, and consequently, independence; juxtaposed partialities, or the legal conflict between two parties, produces or enhances concomitant impartiality,[62] and 'it serves to protect the judiciary's reputation for impartiality'.[63] It is also said that the essence of the judicial function lies not in the substance of the conclusion reached, but in the procedures by which that substance is guaranteed, that is, procedural restraints that are designed to ensure - so far as human nature permits - an impartial and informed outcome of the process of decision.[64]

8.5 Empirical studies

It is submitted that empirical studies on the question of the influence of irrelevant factors on judicial decision-making remain highly speculative, and it is difficult to transpose or transplant such experimental data to real-life adjudication in the context of adversarial or accusatorial contestation, that is, adversarial examination and cross-examination and rebuttal by way of contrary evidence: '[g]iven the many differences between the manner in which facts are presented at trial, it would be wrong to assume that performance on one type of problem will be the same for another type of problem. Actual reasoning processes are content-bound or schema-bound.'[65]

Even in respect of juries, there does not appear to be conclusive empirical research which indicates a general pre-trial publicity effect or biasing effect on jury

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[62] Zupančič (1982) *Journal of Contemporary Law* 82; Labuschagne (1993) *De Jure* 356.
[63] Eckhoff (1965) *Scandinavian Studies in Law* 40.
[64] Fuller (1963) *Wisconsin Law Review* 18.
[65] Waye (2003) *Melbourne University Law Review* 442.

verdicts:[66] indeed, it has been found on a review of such research that there are roughly as many studies that failed to find a pre-trial publicity effect as there were studies that did, and a roughly equal number of studies that produced equivocal results.[67] Studies that did find an effect of pre-trial publicity contained many manipulations that make them difficult to generalise from, and the case against a pre-trial effect seems stronger than the case for it.[68] Contrary views seem to have given too little weight to studies that have found no pre-trial publicity effect and too much weight to laboratory research.[69] The reviewers of this research argue that the odds of information from the mass media making a difference in a juror's decision of guilt or innocence are very small.[70] Their field research of criminal cases has found in fact that in practice highly publicised trials have conviction rates identical with those of trials that receive no publicity at all.[71] They point out that: 'There is anything but a clear, linear influence of pretrial publicity on trial verdicts.'[72] The reviewers also argue that there is not a pre-trial publicity effect that is powerful and able to survive or withstand all remedies designed to ensure the fairness of an accused's trial in the face of such publicity.[73] Although there is case-law indicating that in some cases jurors may be adversely affected by pre-trial publicity, and, for instance, a matter where a conviction was set aside and a retrial ordered because the trial judge's directions to the jury did not remove the prejudice created by media publicity surrounding a verdict in a related, separate trial against initial co-accused,[74] there is also case-law where confidence was expressed in the capacity of jurors in general to disregard extraneous information and maintain impartiality and to decide cases only on the evidence before them.[75]

In *Banana v Attorney-General*, Gubbay CJ remarked that if in general confidence can be had in the good sense and capacity of jurors to act with complete

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[66] For a full discussion of this aspect, see Bruschke & Loges *Free Press vs. Fair Trials*.
[67] *Ibid* 66.
[68] *Ibid* 74.
[69] *Ibid* 74.
[70] *Ibid* xi.
[71] *Ibid* 136.
[72] *Ibid* 136.
[73] *Ibid* 136.
[74] See *R v Sheikh* (2004) 144 A Crim R 124 para 40.
[75] See, for example, *Dagenais v Canadian Broadcasting Corp.* (1995) 94 CCC (3d) 289 (SCC) 322*a*-323*a* (Westlaw para 91); *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) paras 131-134 (Westlaw paras 142-145); *The Queen v Glennon* (1992) 173 CLR 592 para 15, per Brennan J in a concurring judgment. See also the comments in *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37F-38C.

detachment and render a verdict in conformity with the evidence properly admitted, it must follow that there is much less of a likelihood of a judge and assessors being affected in their fact-finding role by intense, adverse pre-trial publicity.[76] Professor Kobus van Rooyen articulates the point more emphatically where he states that 'judges, who are trained to decide a case on the facts before them, will not be influenced by speculation and views expressed in the media.'[77]

8.6 Justice to be seen to be done

It is undoubtedly so that justice must also manifestly be seen to be done. In the present context, parties to a case and the public must be satisfied that the trial court's findings are based upon the evidence laid before court in an admissible way only, and not upon information or comment concerning the merits of the case published in the media.[78] CR Snyman argues that '[o]nce the media is allowed to publish information and comment on a pending case, there will always remain at least a suspicion in the mind of the public and of a party to the case that the court, in coming to its conclusion, was influenced by outside factors.'[79] It is submitted, however, with respect, that such a contention perhaps overstates the position and is speculative. From reasons furnished for a court's decision, it generally could be gauged whether the court was unduly influenced by extraneous matters, and concomitantly, it could objectively be determined whether the court's findings are justified on the admissible evidence. Justice would thus, as observed in this thesis, be seen to be done in the court's judgment.

8.7 Experience

From my own experience with criminal cases that attracted media attention in advance of trial, including the Oscar Pistorius case, the matters were decided on the evidence presented at trial and relevant legal principles, where the evidence was summarised and evaluated in the judgments and inferences drawn from and factual findings made on the evidence.

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[76] 1999 1 BCLR 27 (ZS) 38C.
[77] Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9.
[78] Snyman *Criminal Law* 321.
[79] *Ibid* 321-322.

8.8 Serious high-profile or notorious cases mainly brought to trial in the High Court

Besides the fact that assessors are in a different position to juries in the adjudication process, serious cases that may generate extensive, negative pre-trial publicity would ordinarily be tried in the High Court, where assessors, if appointed, would mostly be legally qualified persons having experience in the administration of justice.

8.9 Pre-trial publicity and the presumption of innocence

It has been noted in chapters five and seven that the presumption of innocence under South African law is not violated by prejudicial pre-trial publicity, but by a reverse onus provision that places an onus on an accused to prove his or her innocence or to disprove an element of an offence charged on a balance of probabilities. The sole determinant of constitutional compliance with the right to be presumed innocent is whether there is a possibility of conviction despite the existence of a reasonable doubt.[80] The scope of the presumption of innocence is restricted to a criminal trial and the presumption means that the burden is on the State to prove the guilt of the accused beyond a reasonable doubt. The purpose of the presumption is to minimise the risk that innocent persons may be convicted. The import of the presumption of innocence is that the prosecution is required at trial to establish a *prima facie* case against the accused through evidence before the accused can be placed on his or her defence. The accused also has the right to remain silent throughout the proceedings and is under no compulsion to testify. Where the State fails to establish a *prima facie* case in evidence on which a reasonable person could convict, the accused is entitled to a discharge at the close of the State's case. The South African accusatorial trial does not start with the evidence of the accused, unlike in inquisitorial systems. The presumption of innocence under South African law, as in other common-law jurisdictions, requires the State to present its case first. As observed in chapter five, the presumption of innocence may also serve as a safeguard against error in the face of pre-trial publicity.

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[80] Schwikkard 'A Constitutional Revolution in South African Criminal Procedure?' in *Criminal Evidence and Human Rights* 31.

8.10 Pre-trial publicity and witnesses

It has been seen in chapters two and seven that any potential tainting of a witness' evidence on account of pre-trial publicity can be dealt with under cross-examination in South Africa's adversarial system, and accordingly dealt with by the trial court in its evaluation or weighing of the cogency or reliability and credibility of the evidence.

8.11 The question of a real and substantial risk of pre-trial publicity giving rise to trial related prejudice, the *sub judice* rule and pre-trial publication bans

In light of the above considerations and conclusions, it is submitted that one would seldom encounter in South Africa's legal system a real and substantial risk of pre-trial publicity prejudicing or adversely affecting the fairness of an accused's trial or biasing the court and the outcome of the trial. As argued in chapter two, it would generally therefore not be reasonable and justifiable in an open and democratic society to restrict media freedom relating to a criminal case in advance of trial and to impose a publication ban even in respect of adverse publicity. Pre-trial publicity would accordingly seldom fall foul of the *sub judice* rule in terms of the reformulated test enunciated by the Supreme Court of Appeal in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*.[81] It is so that the integrity of the judicial process is an essential component of South Africa's constitutional dispensation and the rule of law, and that if the integrity of the judicial process is compromised, then other fundamental rights and freedoms, including freedom of the media, may be compromised.[82] Nonetheless, the right to freedom of expression and the necessity of or public interest in the pre-trial reporting or exposure of crime, corruption and malfeasance, and the need for the media to fulfil their watchdog role, are vital in South Africa's constitutional democracy. The reformulation or development of the *sub judice* rule in the *Midi Television* case supra, has rightly been heralded as a victory for constitutionalism and as having a positive spinoff for freedom of expression and investigative journalism.[83]

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[81] 2007 2 SACR 493 (SCA).
[82] *Ibid* para 12.
[83] Stevenson (2007) *Obiter* 620.

8.12 The question of granting the drastic remedy of a stay of prosecution in light of adverse pre-trial publicity

It is submitted, as was discussed in chapter two, that if there is in general no real and substantial risk of pre-trial publicity prejudicing an accused's trial, it would generally not be in the interests of justice to grant a stay of prosecution predicated on virulent media coverage of a case in advance of trial: it would generally be difficult for an accused in these circumstances to demonstrate that he or she would probably suffer irreparable or actual trial related prejudice on account of such publicity – such a question would indeed be highly speculative (an insufficient yardstick by which to measure whether a stay of prosecution ought to granted),[84] and thus the trial presiding officer would be best placed to assess the circumstances which exist and to decide whether the available procedures are sufficient to enable the court to reach its verdict with an unclouded or unbiased or open mind and objectively, or whether, exceptionally, a stay of prosecution would be the only solution.

There is in general no *a priori* or abstract determination of whether an accused's trial will be fair, and the right to a fair trial requires a substantive rather than a formal or textual approach. The real and substantial risk test of prejudice arising from negative pre-trial publicity must be assessed or weighed against the backdrop of the developed system of procedural safeguards that have evolved to prevent such a contingency. Only when these protective mechanisms are inadequate to guarantee impartiality, will the test be satisfied and a fair trial rendered impossible of attainment.[85] Furthermore, justice requires fairness not only to an accused but also to the victim or the victim's family and the public as represented by the State. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of alleged prejudice on the outcome of the case - is far-reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.[86]

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[84] It was pointed out in chapter two that vague, conclusory and speculative allegations of trial related prejudice are insufficient to found a stay of prosecution – see, for example, *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) para 16. There must be a showing of significant, irreparable, definite or actual trial related prejudice to warrant a stay of prosecution – *ibid* para 16; *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) paras 38-39.

[85] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34I.

[86] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 38.

8.12.1 Judicial abdication on account of adverse pre-trial publicity?

It is submitted that one could not lightly infer that there is a real and substantial risk of pre-trial publicity inducing prejudice or bias in the presiding officer or court with assessors, because that would mean that it would be virtually impossible to find an impartial trial court for a high-profile or notorious case and that an accused could never receive a fair trial. The result would indeed be nothing less than judicial abdication.[87] In the modern era of news reporting, such a proposition needs merely to be stated to convince of its unsoundness. No community governed by law could acknowledge that the media could possess a capacity to disrupt or supersede the administration of justice.[88] It would seriously undermine the criminal law's protection of society to refuse to allow the law to take its ordinary course in such cases.

Some may argue that this would be a policy consideration[89] and that trial related prejudice in the adjudication of a case is likely even in the case of a professional judge, who is still human, where he or she is exposed through the media before trial to highly incriminating evidence against an accused (such as the fact that an accused has made a confession or there is DNA evidence linking the accused to the crime) or to prejudicial information regarding the accused (such as that the accused has previous convictions or is of vile character). However, it is submitted that Graeme Hill is correct in observing that: 'Judges are already required to rule on whether evidence is admissible and to disregard inadmissible evidence when reaching a decision. Accordingly, judges will necessarily be exposed to some inadmissible material and *a rule preventing the publication of that material outside court will not make the trial any more fair*.'[90] Most judicial officers also have years of experience and are aware of the dangers of media reports on high-profile cases.[91] While it is perhaps unrealistic to expect judicial officers to exclude from their minds prejudicial extraneous information, they would know that each case is to be viewed and decided on its own merits, that is, on the evidence properly admitted at trial.[92] Moreover, information regarding notorious pending cases is often leaked to the media, a factor that would in this day and age be very difficult to police or control.

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[87] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36I-37A.
[88] See *The Queen v Glennon* (1992) 173 CLR 592 para 13, per Brennan J in a concurring judgment.
[89] See, for example, Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-135.
[90] Hill (2001) *SAJHR* 566 (my emphasis).
[91] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 115.
[92] *Ibid* para 115, citing *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9.

8.13 Cautionary note to the media

Notwithstanding the above conclusions, it is submitted that the media ought to avoid a trial by media, where evidence is weighed and beliefs or opinions expressed by it as to what the proper outcome of an accused's trial should be. If the media 'convict' an accused before trial, but the accused is later found not guilty by the court, the perception may be created that the court's finding is wrong, whereas in reality it is correct, thereby undermining confidence in the judicial authority.[93] It should be left to the court, in which the judicial authority is vested, to decide on the guilt or innocence of an accused, without pressure from the media as to what the verdict should be. The media before trial ought ordinarily to report on *allegations*. An overwhelming trial by media, as well as public outrage or obloquy - as expressed in the media - which a case may engender because of its high-profile nature or shocking facts, may place difficult fact-finding burdens on a judicial officer whose opinion is later open to scrutiny and criticism when reasons for his or her judgment are published.[94] The media ought therefore not to make statements effectively pronouncing on the guilt, or innocence, of the accused before trial, which may pressurise the trial court to dispose of the case in a particular way or to prejudge issues and consequently interpret or perceive evidence differently. Proper education or training of journalists in this regard is important, or resort possibly had to the crime of contempt of court *ex facie curiae* where pre-trial publicity gives rise to a real and substantial risk of prejudice being occasioned to an accused's trial,[95] albeit that the question may arise whether the *sub judice* rule is possible of policing given the modern era of a rapid dissemination of news not only in the mainstream media but also social media[96] (as far as it is known, there has been no prosecution for this crime since the test for *sub judice* contempt was reformulated in the *Midi Television* case supra). CR Snyman opines that the media ought not to have the right to publish information on a pending case 'which *would* have a *real* influence on its outcome', but which may not be produced as evidence to the court hearing the case.[97] Professor Kobus van Rooyen

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[93] Snyman *Criminal Law* 321.
[94] See, for example, Waye (2003) *Melbourne University Law Review* 427.
[95] Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9. See also the observations in Snyman *Criminal Law* 320-322, regarding this crime and the constitutionality thereof.
[96] See Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 16-17.
[97] Snyman *Criminal Law* 321 (my emphasis).

similarly argues that 'jumping to conclusions in a publication or broadcast as to the outcome of a court case, whilst a matter is still being considered by a court, is at least morally unacceptable: to clearly contribute to such conclusions being made, is equally questionable.'[98]

8.14 Pre-trial publicity and the prosecutor

It has further been considered in this thesis that prosecutors are gatekeepers of the criminal justice system and an integral part of the accusatory process, and thus it is of cardinal importance that they fulfil their duties without fear, favour or prejudice. They are to act impartially, that is, even-handedly, avoiding discrimination, and in the present context, they are to act independently of the media to ensure that the accused receives a fair trial. A prosecutor must refrain from foisting his or her opinion on the trial court, and must disclose any exculpatory evidence either to the court, if the accused is undefended, or to the defence. A prosecutor must not act in single-minded pursuit of a conviction, but must ensure that justice is achieved. Nevertheless, it is inevitable that in an adversarial system a prosecutor will be partisan and perceived to be biased.[99] Prosecutors neither make the final decision on whether to acquit or convict, nor on whether the evidence is admissible or not. Thus, the same level of independence and impartiality required of the judiciary is not required of prosecutors.[100] Moreover, extra knowledge which a prosecutor gains of a case outside the framework of the evidence contained in the police case docket, does not disqualify the prosecutor from handling the case, provided of course that he or she does not make him- or herself a witness in the matter. What is ultimately critical is whether the prosecutor acts fairly in prosecuting the case despite such extraneous knowledge. Whilst most prosecutors fulfil their constitutional and statutory mandate of carrying out their tasks without fear, favour or prejudice, some prosecutors may buckle under pressure emanating from the community and the media to secure a conviction. The court, however, is the ultimate repository of the fairness of the trial,[101] and provided that there is full disclosure of the evidence, it is

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[98] Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9.
[99] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[100] *Ibid* para 11.
[101] *R v Sole* 2001 12 BCLR 1305 (Les) 1342C.

unlikely that an accused would not receive a fair trial even in these circumstances. The danger, nonetheless, exists that a prosecutor's discretion as to whether to institute a prosecution may be coloured by adverse pre-trial publicity, and he or she may, for instance, withhold or conceal exculpatory evidence, or facts favourable to the accused's case, from the defence or the trial court to obtain a conviction at all costs; that is, in order to satisfy the public's demand as expressed in the media for a conviction. Enhanced training and internal NPA supervision or co-ordination of prosecutors are therefore suggested so as to better equip them with the skills to fulfil their task of prosecuting independently and fairly in criminal cases generating extensive and virulent media attention.

Attention will now be focused on the conclusions that may be drawn as to the central task of the judicial officer and the essence of impartiality in the context of pre-trial publicity, and what the *Krion*, Oscar Pistorius and Shrien Dewani cases demonstrate as regards the process of adjudication despite pre-trial publicity.

8.15 Cardinal judicial virtues in the face of adverse pre-trial publicity

The judicial authority (or judiciary) constitutes the third branch or arm of governmental authority, alongside the legislative and executive branches of government.[102] A judicial system which is separate and independent from both the legislative and executive branches of government is regarded as 'an indispensable requirement for ensuring an effective democratic government where individual rights and liberties are properly protected. In general, the courts must interpret and apply the law, which includes the constitution of the state, and do so fearlessly, impartially and without favour or prejudice.'[103] The existence and sustenance of democratic norms and values is dictated by the presence of a balanced, impartial and independent judiciary as the bastion of hope for 'the hopeful and the hopeless' with a view to ensuring that the disputants will feel safe and be ready to accept whatever decision is ultimately rendered by the court, which is only interested in the justice of the matter according to the law without affection, favour or ill will, and which protects and defends the Constitution.[104] The judiciary is widely seen as the last hope of the

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[102] Bekink *Principles of South African Constitutional Law* 469.
[103] *Ibid* 469 (footnote omitted).
[104] WO Egbewole 'Judicial Independence, its Origins and its Operational Dynamics' in WO Egbewole (ed) *Judicial Independence in Africa* (2018) 1 1.

ordinary person and the guardian of the Constitution that ensures that other organs or arms of government do not march into the spheres or boundaries of one another or abuse their powers against the individual.[105]

Judicial authority is vested in the courts.[106] The courts in South Africa are constitutionally enjoined to be independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[107] No person or organ of state may interfere with the functioning of the courts.[108] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent and impartial court.[109] Moreover, inherent in the accused's constitutional right to a fair trial enshrined in section 35(3) of the Constitution, is the right to be tried by an impartial court.[110] The fairness of a trial is clearly under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice.[111] Judicial impartiality and judicial independence are two fundamental judicial virtues that a trial presiding officer must possess in the adjudication of any case that comes before him or her.[112] They are indispensable for realising moral quality in adjudication.[113]

Codes of Judicial Conduct for judges and magistrates in South Africa[114] require judicial officers to be independent and in ensuring a fair trial, to remain manifestly impartial. These Codes also affirm principles of integrity and professional conduct on the part of judicial officers. The Codes moreover state that it is necessary for public acceptance of the authority and integrity of the judiciary in order for it to fulfil its constitutional obligations, that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in *The Bangalore Principles of Judicial Conduct* 2002,[115] endorsed by the United

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[105] MA Etudaiye, ME Etudaiye & AH Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in WO Egbewole (ed) *Judicial Independence in Africa* (2018) 37 37.
[106] Section 165(1) of the Constitution.
[107] Section 165(2) of the Constitution.
[108] Section 165(3) of the Constitution.
[109] Section 34 of the Constitution.
[110] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 35; *S v Basson* 2007 1 SACR 566 (CC) para 26. See also Steytler *Constitutional Criminal Procedure* 266; *S v Van der Sandt* 1997 2 SACR 116 (W) 132*c*: 'A fair trial is in essence a proper ventilation of the dispute before an unbiased competent tribunal.'
[111] *S v Basson* 2007 1 SACR 566 (CC) para 26.
[112] Van Domselaar (2015) *Netherlands Journal of Legal Philosophy* 27, 33-34.
[113] *Ibid* 27.
[114] Referred to in chapter four.
[115] Referred to in chapter four.

Nations General Assembly and adopted in South Africa.[116] These standards or principles, which provide guidance to judicial officers and afford the judiciary a framework for regulating judicial conduct,[117] 'feature six core judicial values of pre-eminent importance to the fair and effective functioning of judicial systems. The judicial values are; independence, impartiality, integrity, propriety, equality and lastly competence and diligence.'[118] A judicial officer must maintain these principles in adjudicating a case.[119]

In South Africa, judicial officers, when taking office, swear or affirm that they will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.[120] Judicial officers also enjoy a built-in presumption of impartiality in adjudicating disputes, a presumption which is not easily dislodged, indeed, requiring cogent or convincing evidence to be rebutted.[121]

Judicial officers must act independently and impartially in the discharge of their duties.[122] In addition, courts must also exhibit independence and impartiality; they must be perceived as independent, as well as impartial.[123] Appearances or perceptions of judicial independence and impartiality are important because these values or principles are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence, the judicial system cannot command the respect and acceptance that are essential to its effective operation.[124]

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116 *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 106.
117 *Ibid* para 107.
118 *Ibid* para 106. The Court proceeded to outline what these judicial values entail (*ibid* paras 108-114).
119 *Ibid* para 114.
120 See, for example, Van der Westhuizen (2008) *AHRLJ* 257-258.
121 See, for instance, *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 12; Bekink *Principles of South African Constitutional Law* 488.
122 *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 31.
123 *Ibid* paras 31-32. See also, for example, *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 22 (Westlaw); *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 159; Steytler *Constitutional Criminal Procedure* 261: 'The old adage that justice must not only be done, but be *seen* to be done, is highly relevant to the independence of the courts. Public confidence in the impartiality of courts is predicated on the perception that courts will act independently.' (Author's emphasis). See further, Steytler *Constitutional Criminal Procedure* 266: 'A judicial officer must not only be impartial in practice but also give the appearance of being impartial.'
124 *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 22 (Westlaw), as cited with approval in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 32.

8.15.1 Judicial independence

The fairness of an accused's trial is not only under threat if the court does not apply the law and assess the facts of the case impartially. It is also under threat if the trial court is not independent.[125] It has been seen in chapter six that judicial independence is firstly a structural or institutional requirement, what one writer refers to as 'collective judicial independence':[126] the judiciary as an institution or arm of government 'must maintain a structural or constitutional independence from the other branches of government';[127] in this sense, judicial independence connotes the ability of the judiciary 'being independent in its general affairs thereby making it separate in its function, process and procedure from other arms of government.'[128] The doctrine of the separation of powers between the executive, legislature and judiciary is the fountain of the independence of the judicial authority.[129] Judicial independence, then, describes a status or relationship of the judiciary to others, particularly to the executive branch of government.[130] In this context, judicial independence means essentially the lack of subordination to any other organ of the State, in particular to the executive.[131] Independence reflects the constitutional position of the judiciary.[132]

More relevant for present purposes, it has been observed in chapters four and six that judicial independence also relates to the absence of interference at an institutional level and at the level of decision-making by every judicial officer.[133] Commentators note in this regard that 'judicial independence may be understood as the ability of a judge or judicial officer to discharge his judicial duties bereft of any form of pressures, inducements or favour.'[134] Courts have affirmed that: 'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another

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125 *S v Jaipal* 2005 1 SACR 215 (CC) paras 30-31.
126 Malleson *The New Judiciary* 45.
127 *Ibid* 45.
128 Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 38-39.
129 Moseneke (2008) *SAJHR* 350; Malleson *The New Judiciary* 45.
130 *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw).
131 Trechsel *Human Rights in Criminal Proceedings* 49, 53.
132 *Ibid* 49.
133 See, for example, Moseneke (2008) *SAJHR* 350.
134 Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 38.

judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision… The ability of individual judges to make decisions in discrete cases free from external interference or influence continues… to be an important and necessary component of the principle.'[135] Judicial independence is the state of being free from outside pressures.[136] The existence of safeguards against outside pressures is a criterion to establish whether a court is independent.[137] Judicial independence would in the circumstances mean that a presiding officer may not be influenced or swayed in his or her decision by media statements, comment or opinions concerning a criminal case, nor should he or she be influenced by pressure that may be brought to bear on him or her in the disposition of the case by society as expressed in the media.[138] If any court permits public opinion, which has no legal basis, to influence its judgment, it will lead to anarchy.[139] A court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public.[140]

It has moreover been considered in chapter six that although judicial independence and impartiality are distinct concepts or principles, they are closely connected.[141] Judicial independence is desirable to promote faith in the impartiality of a court.[142] One of the main goals of judicial independence is to safeguard judicial impartiality,[143] and indeed to ensure a reasonable perception of impartiality.[144] One commentator notes that a component of judicial independence is 'individual

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[135] *Beauregard v Canada* (1986) 26 CRR 59 paras 21-22 (Westlaw), endorsed and described as the essence of judicial independence in *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 70. See also *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19, holding that this central notion of judicial independence 'requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference.' See too Van der Westhuizen (2008) *AHRLJ* 258-259.

[136] Trechsel *Human Rights in Criminal Proceedings* 53-54.

[137] *Ibid* 54, 55-56.

[138] See *S v Dewani* 2014 JDR 2660 (WCC) para 24.7; *S v Makwanyane and Another* 1995 2 SACR 1 (CC) paras 87-89; *S v Mhlakaza and Another* 1997 1 SACR 515 (SCA) 518*e-j*.

[139] *S v Dewani* 2014 JDR 2660 (WCC) para 24.7.

[140] *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 89; *S v Mhlakaza and Another* 1997 1 SACR 515 (SCA) 518*g*.

[141] See also in this respect, *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 1 SA 167 (C) 174J-175C.

[142] *Ibid* 175B-C.

[143] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 35.

[144] *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 1 SA 167 (C) 175C.

independence', which connotes that a judicial officer must approach each individual case with an impartial state of mind, that is, with an open mind as to the strengths and weaknesses of the different parties' cases in relation to the issues before court ('party impartiality').[145] The writer explains that collective judicial independence may help to promote individual impartiality but does not guarantee it. A judicial officer operating in a judiciary which is institutionally independent may still demonstrate partiality when adjudicating in court. This is because the danger from interference is not limited to government. Judicial independence requires that judicial officers are protected in their decision-making from interference by the State and all other influences that may affect their impartiality. A judicial officer may be subject to influences from a wide range of sources - family and friends, the media, academic debate and the political discourse in its widest sense - any of which may undermine impartiality as effectively as governmental pressure. If any influence affects the party impartiality of a judicial officer, it would amount to a breach of judicial independence.[146] Stefan Trechsel pertinently observes that the influence of the media on the impartiality of a judicial officer constitutes a very real danger to his or her independence and impartiality.[147] The media thus has to be mindful of placing any undue pressure on a court as to what it deems to be the proper outcome of a case. The General Assembly of the United Nations has also endorsed a close correlation between judicial independence and judicial impartiality, where the United Nations defines independence as *inter alia* the freedom of the judiciary to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'[148]

It is, nonetheless, not possible to remove judicial officers from all outside influences and judicial officers come to the bench with personal views; what is critical is that in these circumstances they maintain impartiality in the adjudication of each

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[145] Malleson *The New Judiciary* 45, 63-65.

[146] *Ibid* 63-65.

[147] Trechsel *Human Rights in Criminal Proceedings* 56.

[148] *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx> (accessed 23-09-2018).

See also Van der Westhuizen (2008) *AHRLJ* 258; Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 39.

case that comes before them and act as independent arbiters.[149] 'For an individual judge, impartiality and independence imply that the judge has the capacity to be prudent and decide a case on its own merits.'[150]

Three essential conditions of judicial independence have been recognised, namely: (i) security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, secure against interference by the executive or other appointing authority; (ii) a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence; and (iii) institutional independence with respect to matters that relate directly to the exercise of the judicial function, as well as judicial control over administrative decisions that bear directly and immediately on the exercise of the judicial function.[151] Justice Johann van der Westhuizen points out that '[t]he procedure for the appointment and removal of judges embodied in the Constitution provides security of tenure and safeguards independence. Judges are not elected. They can be removed from office only by way of a fairly cumbersome procedure in the case of incapacity, gross incompetence or gross misconduct. They should not have to worry about income or future job offers.'[152]

8.15.2 Judicial impartiality

> Impartiality is *the* central question of adjudication.[153]

The main theme of this thesis has been the question of whether adverse pre-trial publicity or adverse findings made against an accused in parallel judicial proceedings arising from the same facts as a pending criminal case, is likely in South Africa's accusatorial system to materially affect the impartiality required of the presiding judicial officer in adjudication. Central to this theme has naturally been to consider the fundamental nature and features of judicial impartiality in the adjudicatory or decision-making process, particularly in an adversarial system.

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[149] Malleson *The New Judiciary* 65.

[150] J Soeharno 'Is judicial integrity a norm? An inquiry into the concept of judicial integrity in England and the Netherlands' (2007) 3 *Utrecht Law Review* 8 22.

[151] *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 70. See also *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 29; Steytler *Constitutional Criminal Procedure* 261.

[152] Van der Westhuizen (2008) *AHRLJ* 259.

[153] Zupančič (2003) *European Journal of Law Reform* 95 (my emphasis).

Whilst judicial independence is essentially a structural or institutional requirement, in terms whereof the courts are to be kept away from any interference that can hinder their activities,[154] judicial impartiality describes the required state of mind of the arbiter in the adjudication of a case, that is, the state of mind or attitude of the court in relation to the issues and the parties in a particular case.[155] The term 'impartiality' describes a state of mind in which the court is 'balanced in a perfect equilibrium' between the parties - it is synonymous with 'non-partisan'.[156] In an accusatorial trial, impartiality is a state of mind where the presiding officer keeps the scales even in the contest between the prosecution and the accused.[157] The principle of impartiality is encompassed in the notion of judicial integrity,[158] which connotes *inter alia* maintaining the balance between the litigants in any given trial, such that each and every party to the case is given a just and reasonable opportunity to state his or her case (upholding the *audi alteram partem* rule) before any judicial pronouncement is made in respect of the merits.[159]

It has been seen that the most minimal requirement of impartiality in the context of legal disputes is an attitude of openness to and lack of prejudgment of the issues of the parties before court.[160] Impartiality in adjudication is thus the quality of open-minded readiness to persuasion by the evidence and submissions of the parties, without unfitting adherence to either party or to the judicial officer's own predilections, preconceptions and personal views.[161] Impartiality is a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions.[162] Impartiality is the quality of keeping a mind open until judgment, reserving judgment or remaining undecided that is until all relevant

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[154] SD Kamga & GK Kamga 'Independent Judiciary: Lessons from South Africa' in WO Egbewole (ed) *Judicial Independence in Africa* (2018) 186 190.

[155] Moseneke (2008) *SAJHR* 350; *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw); *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*b*-*e*.

[156] Trechsel *Human Rights in Criminal Proceedings* 61.

[157] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 55.

[158] *R v Teskey* (2007) 220 CCC (3d) 1 (SCC) paras 19-20 (Westlaw); Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 38.

[159] Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 57.

[160] Lucy (2005) *Oxford Journal of Legal Studies* 15.

[161] See, for instance, *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48; Bekink *Principles of South African Constitutional Law* 488.

[162] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 104 (Westlaw).

information has been presented by both parties in the case. Impartiality means lacking a prior belief about the proper outcome of a case, and it connotes the ability to set aside any preconceptions or to adjust a prior belief about a case on the basis of the evidence or the merits of the matter. Impartiality ideally requires that the presiding judicial officer, or arbiter, should enter the trial *tabula rasa* as to the adjudicative facts in dispute or the evidence to be produced at trial. This is because prior knowledge of the facts of a case may be predictive of an intuitive judgment, where the guilt or otherwise of a party may be predetermined before judicial proceedings are commenced.[163] In other words, it may result in a prejudgment of the issues, which constitutes clear bias, a bias that may cause the presiding officer to perceive or interpret trial evidence differently or to seek or assimilate evidence selectively, in a way that is which confirms rather than contradicts a prior belief or any preconceptions or initial hypotheses (confirmation bias). For this reason, a judicial officer ought not to have access to the police case docket, which is the prosecutor's brief, before trial. Direct access to witness statements and evidentiary material to be adduced at trial, as contained in the case docket, is very different to exposure which a judicial officer may have to pre-trial publicity, ie to second-hand, and often highly speculative and inaccurate, media reports on a pending criminal case. The latter type of information which is available to the public at large, would rarely disqualify a judicial officer from presiding over the particular case.[164] It may happen that a judicial officer before trial is exposed through the media to some evidential or inadmissible or prejudicial material (such as a confession or admission made by an accused or other highly incriminating evidence) or to material evidence which a prospective witness gives at, for example, a judicial commission of inquiry (as in the case of the Commission of Inquiry into State Capture). However, in chapter six the difference between prior knowledge and prejudice was noted: there is a distinction between prejudging a matter and 'the use of prior knowledge as part of a process of opening up to the possibility of surprise', to use what we know but to suspend our conclusions long enough to be surprised, to learn.[165] In this regard, the following apposite observation by Martha Minow bears repeating: 'None of us can know anything except by building upon, challenging, responding to what we already

[163] Etudaiye, Etudaiye & Okene 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria' in *Judicial Independence in Africa* 56.
[164] See Flamm *Judicial Disqualification* 303.
[165] Minow (1992) *William and Mary Law Review* 1215-1217.

have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or *else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments*. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.'[166] Thus understood, impartiality is a habit of mind, 'a habit of not insisting on seeing what we expect to see, but rather *seeking to see things afresh*… The open mind that judicial impartiality requires calls upon judges *to be aware of their own predilections as far as is possible and to listen to evidence and argument open to the possibility of being persuaded by either side*.'[167]

It has been considered in this thesis that judicial impartiality does not mean colourless or absolute neutrality, which is a chimera in the judicial context. This is because judicial officers are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each judicial officer's performance of his or her judicial duties.[168] As Justice Edwin Cameron points out, judicial officers 'do not enter public office as ideological virgins. They ascend the Bench with a built-in and often strongly-held set of values, preconceptions, opinions and prejudices. These are inevitably expressed in the decisions they give, constituting "inarticulate premises" in the process of judicial reasoning.'[169] It is appropriate for judicial officers to bring their own life experience to the adjudication process.[170] There is a distinction to be made between interference or influences which materially affect 'party impartiality', which is improper, and influences which may affect 'issue impartiality', which is not necessarily improper.[171] Judicial impartiality requires that judicial officers are as impartial as is humanly

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166 *Ibid* 1217 (my emphasis). At the time of writing, Minow was Professor of Law, Harvard University.
167 O'Regan & Cameron 'Judges, bias and recusal in South Africa' in *Judiciaries in Comparative Perspective* 352 (my emphasis). See also Slovenko (1959) *Louisiana Law Review* 648.
168 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 42.
169 Cameron (1990) *SAJHR* 258.
170 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 42.
171 Malleson *The New Judiciary* 64.

possible as between the parties.[172] It does not oblige judicial officers to be impartial in relation to all issues which might be raised in court.[173] It is in practice impossible, and indeed it is undesirable, for judicial officers to come to court with no prior ordering of values or priorities.[174] In relation to matters of justice and ethics there is a positive expectation that judicial officers will be partial - for example, in favour of truth over dishonesty, equality over discrimination and fairness over unfairness.[175] Value judgments and the exercise of judicial discretion are brought into the daily grind of courts of law, in relation to which extra-legal considerations may loom large. Moreover, the question of the probability or improbability of a version presented in court is assessed in light of the background knowledge, experience, education or common sense of the adjudicator.[176]

All judicial officers have ideologies or an underlying worldview or philosophy of life and personal convictions, preferences and prejudices. There is no judicial officer, as a human being, who is not the product of every social experience, every process of education, every human contact, and his or her political, economic and social status.[177] Judicial officers are shaped by their background and experience. All judicial officers will have particular opinions on such issues as politics, religion, labour relations, taxation, education, parenting and marriage which may influence them in favour of one or another argument in any particular dispute.[178] Impartiality also, as Judge Jerome Frank made clear, does not entail the total absence of preconceptions in the mind of the judicial officer, for if that were the case no one would ever have had a fair trial and no one ever would.[179] What is required is recognition that judicial officers are human and the products of their class, education and ideological and other preferences.[180] Judicial officers 'must then try to the best of their intellectual, moral and emotional ability to take decisions according to the Constitution and its values, and the law, as their oath of office demands from them.'[181] The starting point, framework and outcome of the judicial process must be

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[172] *Ibid* 64.
[173] *Ibid* 64.
[174] *Ibid* 64-65.
[175] *Ibid* 65.
[176] See, for example, Nicholas (1985) *SALJ* 43.
[177] See, for instance, *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 34-35 (Westlaw).
[178] Malleson *The New Judiciary* 65.
[179] *In re JP Linahan* 138 F.2d 650 651 (1943).
[180] Van der Westhuizen (2008) *AHRLJ* 261.
[181] *Ibid* 261.

legal.[182] True impartiality does not require that judicial officers have no sympathies or opinions; what it does require is that judicial officers '"*nevertheless be free to entertain and act upon different points of view with an open mind*."'[183] 'Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations.'[184] One writer articulates the matter as follows, in relation to what judicial impartiality in the process of adjudication essentially connotes:[185]

> Judicial impartiality implies that a judge is disposed to distance himself from his attachments in daily life when addressing the case before him. An impartial judge disregards his personal make-up and is disposed to recognize and ignore considerations stemming from his possible interests, biases, passions, and subjective commitments. This of course is not tantamount to the ability of the judge to relinquish his experiences, commitments, and concerns, that is, to give up his personality. A judge cannot perceive well if he does not genuinely understand the meaning and the practical bearing of a wide range of phenomena and concepts such as discrimination, fraud or sexual abuse, and for this kind of knowledge he needs to have experience himself. [Perception is trained by actual experience].

It is no more possible for judicial officers to divorce themselves from the commitments and experiences that constitute their lives, or that give their lives meaning and value, than for anyone else - these cannot simply be set aside when a judicial officer is called upon to be impartial in the adjudication of a particular case.[186] As a general attitude to life, impartiality may be possible but certainly not desirable.[187] The commitments and associated experiences of judicial officers serve to give them knowledge of human life.[188] What judicial impartiality would require, and indeed presupposes, is for the judicial officer to lay aside 'any irrelevant personal beliefs or predispositions', in the adjudication of the case before court - to approach the case with a mind open to persuasion by the evidence and the

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[182] *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 207.
[183] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 35, 119 (Westlaw) (my emphasis).
[184] *Ibid* para 120 (Westlaw).
[185] Van Domselaar (2015) *Netherlands Journal of Legal Philosophy* 33-34 & n 55 (footnote omitted). See also Lucy (2005) *Oxford Journal of Legal Studies* 14-16.
[186] Lucy (2005) *Oxford Journal of Legal Studies* 14.
[187] *Ibid* 14.
[188] *Ibid* 14-15.

submissions of counsel.[189] Impartiality 'only makes sense against a background of partiality.'[190] Judicial impartiality is a combination of open-mindedness to, and a willingness to suspend assumptions about, both the litigants and their dispute.[191]

It was observed in chapter six that judicial officers are not automatons; their personal idiosyncrasies, traits, dispositions, ideology, habits, sympathies and antipathies, and the inarticulate premises, intuition, subconscious or subliminal forces or underlying prejudices, biases and preferences may be at work in or influence or shape their decision-making. It was noted in this regard that, as John Dugard states: 'As long as the judicial function is entrusted to men, not automatons, subconscious prejudices and preferences will never be completely removed from the judicial process… [T]he role played by the inarticulate premiss in the judicial process cannot be refuted.'[192] Gretchen Carpenter indicates that unconscious bias 'is probably more common than was believed in the past. Today it is more readily accepted that even the rigorous training in objectivity that lawyers receive cannot insulate them entirely from their own backgrounds and preconceptions.'[193] However, it is accepted that awareness by a judicial officer that his or her judgment may be thus affected, 'must go a long way toward eliminating bias or prejudice'.[194]

While the notion that only the remotest possibility exists of a trained judicial officer, who is imbued with basic impartiality or presumed to be impartial, being consciously or subconsciously influenced by extraneous matter, is perhaps over-sanguine or an overstatement, it is submitted that procedural safeguards and judicial mechanisms, the salient of which have been considered in this thesis, would at least limit the extent to which extraneous matters may influence or sway his or her decisions.[195] Safeguards have evolved in the judicial system to promote and preserve impartiality on the part of the arbiter in the adjudication of a case and to rid the influence of prejudice. There are also strict decisional rules, relating to the evaluation and assessment of evidence and the application of precedent or legal principles to the facts, that must be complied with in delivering a judgment on the

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[189] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48.
[190] Lucy (2005) *Oxford Journal of Legal Studies* 14.
[191] *Ibid* 15.
[192] Dugard (1971) *SALJ* 187-188.
[193] Carpenter (2006) *CILSA* 372.
[194] *Ibid* 372. See also in this respect, Frank *Law and the Modern Mind* 148; Dugard (1971) *SALJ* 188-189.
[195] See, for example, Hill (2001) *SAJHR* 567.

merits. These would limit the impact of potential subconscious influences or biases. Moreover, it is submitted that while the notion of total or absolute judicial impartiality may be a myth, the vast majority of judicial officers are persons of impeccable integrity who strive to act with impartiality, that is with a mind open to the parties and the evidence and arguments presented, and to dispense justice without fear, favour or prejudice,[196] in fulfilment of their oath. The judicial virtue of integrity is the capacity to be mindful of the core values of the judicial function or process and to mediate these values with the concrete demands of the case.[197] Judicial officers generally do their best to execute their judicial tasks with diligence, competence and integrity.

In this thesis it has been pointed out that: 'The whole concept of a "fair trial" presupposes a trial in which the court decides on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media.'[198] In *Banana v Attorney-General* it was held that: 'One of the crucial elements of a fair hearing is the right to be tried solely on the evidence before the court, and not on any information received outside that context.'[199] A crucial element of judicial impartiality is such an attitude of the arbiter that guarantees that the conflict is going to be decided on intrinsic rather than extrinsic considerations. This means that the case will be decided exclusively on the basis of the information brought out by the parties at trial - information that is legally relevant - and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin, or any other extraneous matter, such as pre-trial publicity or adverse findings implicating an accused as contained in a decision(s) given in parallel judicial proceedings arising from the same facts as the pending criminal case. Impartiality in the adversary system means that the case will be decided on the basis of the issues determined and evidence adduced primarily by the parties because the adjudicator must remain relatively passive and not carry out independent truth-finding or pursue his or her own agenda; an essential element of impartiality in the adversary structure of decision-making, is taking into account everything presented by the parties.[200] The requirement that the adjudicator is to base his or her decision solely on the

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[196] Carpenter (2006) *CILSA* 376.
[197] Soeharno (2007) *Utrecht Law Review* 22.
[198] Snyman *Criminal Law* 321.
[199] 1999 1 BCLR 27 (ZS) 31D.
[200] Zupančič (1982) *Journal of Contemporary Law* 71.

evidence adduced at trial and the arguments of the parties, and not on any outside matters such as media coverage of the case, can be achieved provided that judicial officers act with integrity and are ever mindful of the potential influence of the inarticulate premises, and where there are procedural safeguards and judicial mechanisms in place to guarantee or to promote and enhance the impartial adjudication of disputes and to rid the influence of prejudice. Whether there is any prejudice arising from pre-trial publicity must be assessed from the trial proceedings and ultimately from the reasons for the court's decision. Nonetheless, greater introspection and vigilance on the part of judicial officers are recommended to recognise the potential influence of the inarticulate premises, particularly subconscious prejudices and preferences or subliminal forces, and in so doing, to eliminate or to reduce the risk of bias or prejudice affecting the decision-making process. Judicial training is also fundamental in this respect.

Certain commentators suggest that the Supreme Court of Appeal decision of *Shaik v The State (2)*[201] demonstrates how judicial officers may be subconsciously influenced by publicity.[202] This case pertained to an appeal against confiscation orders made pursuant to Schabir Shaik's conviction on charges of corruption and fraud in the Durban and Coast Local Division of the High Court.[203] The presiding trial judge, Hilary Squires J, found in his judgment that the evidence showed that a 'mutually beneficial symbiosis' existed between Shaik and Jacob Zuma, who was not tried together with Shaik.[204] In the appeal judgment on the confiscation orders, the Supreme Court of Appeal referred to the facts which underpinned the conviction on count 1, which the Court stated were fully dealt with in the appellate decision on that matter.[205] In the latter judgment dealing with the merits of the convictions and sentences themselves, the Supreme Court of Appeal, in dismissing the appeal, referred to the phrase 'mutually beneficial results',[206] and quoted Squires J's reference to a 'mutually beneficial symbiosis'.[207] The Supreme Court of Appeal, however, in the confiscation appeal judgment, wherein the appeal was dismissed in part, held that 'Shaik and Mr Jacob Zuma engaged in what the trial court

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[201] 2006 SCA 134 (RSA).
[202] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-135 n 742.
[203] *S v Shaik and Others* 2007 1 SACR 142 (D).
[204] *Ibid* 190*h-i*.
[205] *Shaik v The State (2)* supra para 7.
[206] *S v Shaik and Others* 2007 1 SACR 247 (SCA) para 218.
[207] *Ibid* para 33.

appropriately called "a generally corrupt relationship" which involved frequent payments by Shaik to or on behalf of Zuma and a reciprocation by Zuma in the form of the bringing to bear of political influence on behalf of Shaik's business interests when requested to do so.'[208] Reference to the phrase 'generally corrupt relationship' was a misattribution in relation to what the trial court had actually found.

According to the commentators, the prosecution had referred to the phrase 'generally corrupt relationship', which the media repeated extensively. Thus, the fact that the Supreme Court of Appeal wrongly attributed the phrase to the trial court in describing the relationship between Shaik and Zuma, 'arguably illustrates that even appeal judges may be subconsciously influenced by publicity.'[209]

It is submitted, however, that it is speculative whether the Supreme Court of Appeal was necessarily influenced by media coverage surrounding the Schabir Shaik trial, as aforesaid. It is to be noted that the Supreme Court of Appeal's judgment on the confiscation orders was a subsidiary judgment to the same Court's judgment appertaining the appeal against the convictions and sentences. The same Justices who presided in the latter appeal presided in the appeal against the confiscation orders. In the appeal against the convictions and sentences, reference was never made by the Supreme Court of Appeal to the phrase 'generally corrupt relationship'. The trial court found in the context of the corruption charges that the evidence established a 'mutually beneficial symbiosis' between Shaik and Zuma. The words 'generally corrupt relationship' were consistent with the evidence proving the corruption charges. Shaik applied for leave to appeal in the Constitutional Court against the decisions of the Supreme Court of Appeal,[210] wherein he raised the issue of the mistaken attribution. In his written Heads of Argument, Shaik made the point that the misattribution created a reasonable perception 'that the SCA took into account information outside of the record, such as the media where the seed of this incorrect attribution was sown and later flourished by being repeated over and over'.[211] In the State's Heads of Argument, however, it was argued that 'the effect of the High Court's judgment was that there was indeed a generally corrupt relationship between Shaik and Zuma. The Supreme Court of Appeal was merely mistaken "*in*

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[208] *Shaik v The State (2)* supra para 8.
[209] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-135 n 742.
[210] *S v Shaik and Others* 2008 1 SACR 1 (CC).
[211] See D Davis, GJ Marcus & JE Klaaren 'The Administration of Justice' (2006) *Annual Survey of South African Law* 841 847-848.

its impression that the High Court had used the phrase attributed to it". The State pointed out that *both sides in the litigation had in fact from time to time referred to the charge of a generally corrupt relationship in count 1*'.[212] It is thus submitted that the misattribution may have been due to the use of the impugned phrase in the litigation. In addition, if one has careful regard to the factual context of Squires J's judgment and that the essence of the case involved corrupt activities between Shaik and Zuma, it is submitted that the suggestion that the appeal judges may have been 'subconsciously influenced' by the media publicity is open to question. Needless to say, the aspect of the misattribution in question was not pursued in oral argument, and the appeal was dismissed.

It is submitted that it would be more correct to ask whether the appellate judges were adversely affected or influenced in the ultimate verdict which they reached in the confiscation case, by the impugned publicity. As the misattributed phrase accorded with the evidence and the context of the criminal trial matter, the answer to this question would have to be no. It is further interesting to observe that the misattribution could be discerned from a reasoned judgment. This reinforces the submission made in this thesis that the requirement of giving reasons for a decision would be an important safeguard in detecting error in the face of pre-trial publicity.

It must be assumed that judicial officers have a capacity, from their training, experience and oath of office, to lay aside evidence or information of a prejudicial kind which has been heard or seen but is not relevant to the determination of the questions before court.[213] This is more than a pious hope. In light of this factor along with the safeguards or protective mechanisms in the judicial system, it would generally be unlikely that a judicial officer could be influenced by the media.

It has moreover been seen in this thesis that judicial impartiality may also be defined, quite logically, in negative terms as the absence of bias, actual or perceived,[214] and that one of the best guarantees of impartiality on the part of courts 'is conspicuous impartiality.'[215] What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct

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[212] *Ibid* 848 (my emphasis).

[213] See *R v Burrell* (2007) 175 A Crim R 21 paras 7-10.

[214] *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 (SCC) para 15 (Westlaw); *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 104 (Westlaw); Trechsel *Human Rights in Criminal Proceedings* 61.

[215] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 27, reaffirming the decision of *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 3 SA 673 (A) 694G.

must be manifest to all those who are concerned in the trial and its outcome, especially the accused.[216] Thus, where judicial impartiality is seen in the conduct of the presiding officer at trial and in the reasons for the judgment on the merits, such would go a long way to affirming actual impartiality in the adjudication process.

8.16 The impact of the *Krion*, Oscar Pistorius and Shrien Dewani cases

A trial by media can be pernicious. To condemn or 'convict' a person of criminal wrongdoing before he or she has had due process or a fair trial where all allegations and evidence can be properly tested and ventilated in a court of law and where the *audi alteram partem* rule is respected, can be particularly damaging to the dignity, reputation and social standing of the person. Unfortunately, this is pervasive in the media which frequently panders to the court of public opinion and is often biased in the manner in which it reports on crime. Such media reporting is also frequently inaccurate and speculative. A trial by media may moreover undermine the confidence that can be had in the authority of the court to decide on the guilt or innocence of an accused. If an accused is 'convicted' in the media, but the court ultimately finds the accused not guilty, the perception may be created that the court's finding is wrong, whereas in reality it is correct.[217]

Being accused of crime, that is reported on in the media, can give rise to prejudice not only in relation to the concerned individual's *fama* or *dignitas* and right to privacy, but also to finance, career advancement, employment, and social pressures on the individual and his or her family.[218] However, these are not essentially trial related prejudices.[219] They impact on a suspect or an accused and his or her family personally, and are the unfortunate exigencies of being involved particularly in a high-profile case.[220] Such forms of prejudice may be said to be unavoidable and unintended by-products of the criminal justice system.[221] Furthermore, it is very difficult to regulate or to police the media vis-à-vis pre-trial publicity, given the modern era of a rapid dissemination of news on many different media platforms.

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[216] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 14.
[217] Snyman *Criminal Law* 321.
[218] See, for example, *S v Van der Vyver* 2007 1 SACR 69 (C) para 9.
[219] *Ibid* para 9.
[220] *Ibid* para 9.
[221] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 23.

While a trial by media can be particularly harmful to the individual concerned and his or her family, as aforesaid, the question remaining, which has been the focus of this thesis, is whether pre-trial publicity is likely to materially affect the fairness of an accused's trial, especially the impartial adjudication of the case - whether, that is, pre-trial publicity is likely to have a biasing effect on the outcome of an accused's trial. It is not inconceivable that a trial court may feel pressured by the court of public opinion and a trial by media to dispose of a case in a particular way. However, a presiding officer is constitutionally enjoined to act as an independent arbiter and to impartially decide a case solely on the basis of the evidence and facts before court. As pointed out above, a court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. If courts allow themselves to be easily swayed by the media or public opinion, there is no hope for justice in high-profile cases - it would indeed be impossible to find an independent and impartial judicial officer in such matters. Letting justice run its course cannot be hamstrung or undermined by the media - this is so for accused persons and the victims of crime. Otherwise, a trial by media and public obloquy would effectively be substituted for, or supersede, a trial according to the Constitution and the law and the court's ultimate verdict.

The Shrien Dewani and Oscar Pistorius criminal trials are two prime cases in point, that have been referred to in this thesis. It is submitted that these cases show that notwithstanding overwhelming worldwide media attention which the matters generated before trial and which portrayed or suggested that each accused was guilty of the crime of murder, the respective trial courts evinced a capacity to act as independent and impartial arbiters of the guilt or innocence of the accused. It was noted in chapter five that in the Dewani case, the trial Court discharged the accused at the close of the State's case because there was insufficient evidence on which a reasonable person could convict. The Court reached this conclusion despite strong public opinion that the accused ought to have been placed on his defence.

It is so that the trial court materially erred in the Oscar Pistorius case in convicting the accused of culpable homicide and in ultimately sentencing the accused to six years' imprisonment on the altered murder conviction.[222] It is submitted, however, that if one has regard to the record and the trial court's

[222] See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA); *Director of Public Prosecutions, Gauteng v Pistorius* 2018 1 SACR 115 (SCA).

judgments on conviction and sentence, it does not appear as if these errors were the result of the adverse pre-trial publicity attendant upon the case.[223] On the contrary, it is striking to note that despite pre-trial publicity which 'convicted' the accused or suggested or implied that the accused was guilty of *murder* before trial (one has rarely encountered a more intense and sustained trial by media exhibited in this case, except perhaps in relation to the OJ Simpson case or, in South Africa, the Jacob Zuma fraud and corruption matter and rape trial), the trial court nonetheless convicted the accused merely of culpable homicide. The mistaken findings *in casu* were *ex facie* the record made on the trial court's interpretation of the evidence and relevant legal principles. There is naturally a fundamental distinction between a *bona fide* error and an error occasioned by bias. Stefan Trechsel appositely observes in this regard that '[i]t would not be realistic to expect that judges and tribunals make no mistakes, but such mistakes must be *bona fide* rather than the result of preferences or prejudices, be it towards the parties or in relation to the subject matter with which the proceedings are concerned.'[224] Greater 'rigours' may have been brought to bear on Masipa J in presiding in the case in light of the enormous international media attention attendant upon the trial proceedings, particularly the televising of the proceedings, but not in a sense of her independence and impartiality being undermined.

Judicial officers would be aware of the dangers of media reports on high-profile cases and that each case is nevertheless to be decided on its own merits.[225] Judicial officers, however, would still need to exercise caution in not allowing themselves to be influenced by media publicity on cases, especially bearing in mind the nature of the dissemination of news in the modern era and in social media, particularly the manner in which information can be so easily manipulated in the media – there can be, and often is, a proliferation on various media platforms of disinformation and 'fake news'.

It has been unique in this thesis, from a South African perspective, to explore the question of whether adverse findings made against an accused in a judgment given in parallel judicial proceedings arising from the same facts as the accused's pending criminal case, are likely to have an impact on the accused's trial. As was

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[223] See the remarks of Leach JA in *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA) para 57, in relation to Masipa J's conducting of the trial proceedings.
[224] Trechsel *Human Rights in Criminal Proceedings* 61.
[225] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 115.

considered more closely in chapter seven, it is submitted that the *Krion* case demonstrates that there would generally not be a real and substantial risk of such findings or judicial pronouncements materially affecting the fairness of the accused's criminal trial or the impartial adjudication or disposition thereof. While there may be merit in the argument that, being human, judicial officers would not be able to unbite the apple of knowledge, they would know from their training, experience and oath of office, that they are required to lay extraneous or prejudicial information aside and decide the cases that come before them on the basis of the evidence and facts placed before court. A judicial officer would further know that the decision on facts in one case is irrelevant in respect of any other case, and that he or she would have to confine him- or herself to the evidence produced in the case he or she is actually trying. The trial judicial officer in a criminal case would also be aware that the State would still need to prove the facts required for a conviction beyond a reasonable doubt on the basis of evidence presented in that case, despite a judgment given in parallel judicial proceedings.[226] Moreover, in the *Krion* matter, the findings in the civil judgments did not pre-empt any subsequent findings that would be made by the criminal trial court on the merits. The judgments of both the trial court and the Supreme Court of Appeal *in casu* show that neither Court (including the court *a quo* with assessors) was unduly influenced in the disposition of the case by the impugned civil decisions. Their decisions were based on the evidence presented at trial and the submissions of counsel. Justice was thus also seen to be done.

It is submitted that the *Krion*, Pistorius and Dewani cases show that presiding judicial officers have a capacity to lay aside extraneous information and to decide the cases before them on the basis of the evidence placed before court; they have a capacity not to be unduly influenced by pre-trial publicity in the adjudication of a particular case. Pre-trial publicity would rarely bias trial outcomes in South Africa's legal system, having regard also to the principles that govern and the procedural safeguards inherent in the South African accusatory trial.

8.16.1 The import of the *Krion* case for the impending Jacob Zuma trial

It is submitted that the *Krion* case has important implications for the impending Jacob Zuma trial on charges of racketeering, money laundering, fraud and corruption

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[226] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9, affirming *R v Lechudi* 1945 AD 796 801.

arising from substantially the same facts as the Schabir Shaik case. The presiding officer in the Zuma case will no doubt be aware of the findings made in the Shaik case that suggest criminal wrongdoing on corruption on the part of Zuma. In the Shaik matter it was found in essence that Zuma received to his benefit a series of corrupt payments (238 in total) to the value of more than R1.2 million. These payments were made to Zuma by Shaik or one or other of his corporate entities with the intention to influence Zuma to perform his official duties or to use his name and political influence in ways that would benefit or be to the advantage of Shaik's commercial interests or business enterprises. The trial court found in this context that a 'mutually beneficial symbiosis' existed between Shaik and Zuma and that the payments in question could only have generated a sense of obligation in Zuma to benefit Shaik's business interests by using his name and political office as and when they were asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from.[227] In its appeal judgment on the convictions and sentences, the Supreme Court of Appeal deemed this relationship between Shaik and Zuma to be 'corrupt' and one of 'mutually beneficial results'.[228] Both the trial court and the Supreme Court of Appeal referred to interventions by Zuma to protect or further Shaik's business interests as counter performance for the payments made to him by Shaik. It was found that Shaik readily turned to Zuma for help on the basis of the payments and Zuma readily gave such help. It was moreover found that Zuma, along with Shaik and a French arms supplier, was a party to the solicitation of a R500,000 per year bribe by the French company to Zuma in exchange for Zuma shielding the company from investigation into their role in the then much discussed arms procurement dealings, and also for his support or promoting of its future projects in South Africa. These findings effectively form in part the substance of the indictment against Zuma.

One cannot always gauge the extent of the influence which extraneous information may have on the subconscious mind of a presiding judicial officer (and/or, where appropriate, his or her assessors).[229] However, it is submitted that the *Krion* case illustrates that the presiding judicial officer in the Zuma trial would have the capacity to lay aside the findings pronounced in the Shaik case, and would

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[227] *S v Shaik and Others* 2007 1 SACR 142 (D) 190*h*-191*a*.
[228] *S v Shaik and Others* 2007 1 SACR 247 (SCA) paras 218-219.
[229] *S v Mthembu and Others* 1988 1 SA 145 (A) 155C-D. See also *S v Maputle and Another* 2003 2 SACR 15 (SCA) para 13.

know that the factual findings made in the Shaik case would be irrelevant in the Zuma matter. He or she would also know that the Zuma case would have to be decided on the evidence adduced in that case, and that the State will have to prove its case against Zuma beyond a reasonable doubt on the basis of presenting evidence at trial and testing and rebutting the defence case insofar as Zuma's version is inconsistent with the State's case. The findings in the Shaik case implicating Zuma, could not be used against the latter in his trial as he was not a party in the Shaik matter. In the Zuma trial, the accused will have the full benefit of the *audi alteram partem* rule (constitutionally enshrined), having the opportunity to challenge and answer the State's case against him. It will then be incumbent on the trial court to take into account both the State's case and the defence case in reaching its decision on the merits. Moreover, Zuma's trial will be subject to procedural safeguards and judicial mechanisms designed to promote and enhance judicial impartiality in the adjudication of his case, and provided that the presiding judicial officer acts with integrity and in terms of his or her oath of office, it is doubtful that the implicative findings in the Shaik case will have an adverse impact or influence on the fairness of Zuma's case. The procedural safeguards would at least limit the extent to which the extraneous information may consciously or subconsciously influence the trial court. Similar considerations would apply if the presiding judicial officer decides to sit with assessors, who would adjudicate with him or her on the case; they would constantly be under his or her guidance and they will deliberate with him or her in reaching a decision on the merits.

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Explanatory note on references or citations in the thesis text

The mode of citations for references in this thesis primarily follows the *Stellenbosch Law Review* Style Guide, particularly in relation to books, chapters in books, loose-leaf publications, theses and dissertations, journal articles, press articles and internet sources.[1] In respect of books, a full citation is given for the first reference. In subsequent references, only the surname of the author, title of the book (possibly an abridged title of the book) and the page(s) to which reference is made, are given. Pertaining to theses and dissertations, the same conventions as with books are followed. The first reference relating to these is a full citation, including the name of the degree for which the thesis or dissertation was presented, the name of the university which conferred the degree, and the relevant year in brackets. Subsequent references only contain the surname of the author, the title of the thesis or dissertation and the page(s) to which reference is made. As with books, subsequent references to theses or dissertations may contain an abridged title of the work.

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In relation to case-law, full citations are given for each case in the first and, in most instances, subsequent references, and then the specific page or paragraph number to which reference is made.

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[1] <http://blogs.sun.ac.za/iplaw/files/2018/02/Stellenbosch-Law-Review-Style-Guide.pdf> (accessed 02-10-2018).

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